No. 15-537

Title:	Juan Bravo-Fernandez and Hector Martinez-Maldonado, Petitioners
	v.
	United States
Docketed:	October 27, 2015
Lower Ct:	United States Court of Appeals for the First Circuit
Case Nos.:	(14-1089, 14-1091)
Decision Date:	June 15, 2015
Rehearing Denied:	July 27, 2015

Questions Presented

----Date---	------Proceedings and Orders----------
Oct 23 2015	Petition for a writ of certiorari filed. (Response due November 27, 2015)
Nov 18 2015	Order extending time to file response to petition to and including December 28, 2015.
Dec 16 2015	Order further extending time to file response to petition to and including January 27, 2016.
Jan 22 2016	Order further extending time to file response to petition to and including February 10, 2016.
Feb 10 2016	Brief of respondent United States in opposition filed.
Feb 23 2016	Reply of petitioners Juan Bravo-Fernandez and Hector Martinez-Maldonado filed.
Feb 24 2016	DISTRIBUTED for Conference of March 18, 2016.
Mar 21 2016	DISTRIBUTED for Conference of March 25, 2016.
Mar 28 2016	Petition GRANTED limited to Question 1 presented by the petition.
Apr 7 2016	The time to file the joint appendix and petitioners' brief on the merits is extended to and including June 10, 2016.
Apr 7 2016	The time to file respondent's brief on the merits is extended to and including August 12, 2016.
Jun 10 2016	Joint appendix filed.
Jun 10 2016	Brief of petitioners Juan Bravo-Fernandez and Hector Martinez-Maldonado filed.
Jun 17 2016	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jun 17 2016	Brief amicus curiae of Cato Institute filed.
Jun 17 2016	Brief amicus curiae of National Association for Public Defense filed.
Jun 17 2016	Brief amici curiae of Criminal Law Professors filed.
Jul 13 2016	SET FOR ARGUMENT on Tuesday, October 4, 2016.
Jul 22 2016	Record requested from the U.S.C.A. 1st Circuit.
Jul 28 2016	Record received from U.S.D.C. District of Puerto Rico is electronic and located on PACER.
Jul 29 2016	Record received from the U.S.C.A. 1st Circuit is electronic and located on PACER with the exception of one Joint Appendix (1 Box).
Aug 4 2016	Record received from U.S.D.C. District of Puerto Rico (2 Boxes 1 of which is SEALED).
Aug 12 2016	Brief of respondent United States filed. (Corrected copy filed & distributed 9/2/16.)

Aug 19 2016	CIRCULATED.
Sep 12 2016	Reply of petitioners Juan Bravo-Fernandez and Hector Martinez-Maldonado filed. (Distributed)
Oct 4 2016	Argued. For petitioners: Lisa S. Blatt, Washington, D. C. For respondent: Elizabeth B. Prelogar, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Nov 29 2016	Adjudged to be AFFIRMED. Ginsburg, J., delivered the opinion for a unanimous Court. Thomas, J., filed a concurring opinion.
Jan 3 2017	JUDGMENT ISSUED.

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15-537

No. 15-___

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IN THE

Supreme Court of the United States

JUAN BRAVO-FERNANDEZ AND
HECTOR MARTÍNEZ-MALDONADO,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTIONS PRESENTED

In *Ashe v. Swenson*, 397 U.S. 436 (1970), this Court held that the collateral estoppel aspect of the Double Jeopardy Clause bars a prosecution that depends on a fact necessarily decided in the defendant's favor by an earlier acquittal. Here, a jury acquitted petitioners of conspiring and traveling to violate 18 U.S.C. § 666, but convicted petitioners of violating § 666. The convictions were vacated on appeal because they rested on incorrect jury instructions, and it is undisputed that the acquittals depended on the jury's finding that petitioners did not violate § 666. The government nonetheless sought to retry petitioners on the § 666 charges.

Widening an acknowledged split, the First Circuit held that the acquittals have no preclusive effect under *Ashe* because they were inconsistent with the vacated, unlawful convictions. The First Circuit distinguished *Yeager v. United States*, 557 U.S. 110 (2009), which held that an acquittal retains its preclusive effect even when it is inconsistent with a hung count, on the theory that juries "speak" through vacated convictions, but not through hung counts. The questions presented are:

1. Whether, under *Ashe* and *Yeager*, a vacated, unconstitutional conviction can cancel out the preclusive effect of an acquittal under the collateral estoppel prong of the Double Jeopardy Clause.

2. Whether, under *Evans v. Michigan*, 133 S. Ct. 1069 (2013), the Double Jeopardy Clause permits a district court to retract its "judgment of acquittal" entered on remand as an interpretation of the Court of Appeals mandate.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF APPENDICES	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT	1
A. The Jury Issues a Split Verdict	4
B. The First Circuit Reverses or Vacates All Convictions	5
C. The District Court Issues and then Retracts a Judgment of Acquittal on All Counts	6
D. The Decision Below	7
REASONS FOR GRANTING THE PETITION	9
I. The First Circuit Deepened an Acknowledged Split About the Collateral Estoppel Aspect of the Double Jeopardy Clause	9
A. The Decision Below Conflicts With Decisions of the Supreme Courts of Michigan, New Mexico, and Iowa	10
B. The Decision Below Conflicts With *Yeager* and Other Decisions of this Court	14

TABLE OF CONTENTS—Continued

Page

C. The Question Presented Is Important and Recurring, and this Case Is an Ideal Vehicle 20

II. The Decision Below Permitting Retraction of a Judgment of Acquittal Conflicts With this Court's Decision in *Evans v. Michigan* 24

CONCLUSION 26

TABLE OF APPENDICES

APPENDIX A: Opinion of the United States Court of Appeals for the First Circuit Decided June 15, 2015 ..... 1a

APPENDIX B: Opinion of the United States District Court for the District of Puerto Rico Decided December 23, 2013 ..... 41a

APPENDIX C: Order of the United States District Court for the District of Puerto Rico Dated November 8, 2013 ..... 54a

APPENDIX D: Opinion of the United States Court of Appeals for the First Circuit Decided June 26, 2013 ..... 59a

APPENDIX E: Order of the United States Court of Appeals for the First Circuit Dated July 27, 2015 (Denying Rehearing En Banc) 134a

APPENDIX F: Order of the United States Court of Appeals for the First Circuit Dated August 6, 2015 (Staying the Mandate) 136a

TABLE OF AUTHORITIES

CASES	Page(s)
Ashe v. Swenson, 397 U.S. 436 (1970)	*passim*
Banther v. State, 884 A.2d 487 (Del. 2005)	12
Bond v. United States, 134 S. Ct. 2077 (2014)	21
Bullington v. Missouri, 451 U.S. 430 (1981)	14, 17
Cleveland v. United States, 531 U.S. 12 (2000)	21
DeSacia v. State, 469 P.2d 369 (Alaska 1970)	12, 13
Dodrill v. Ludt, 764 F.2d 442 (6th Cir. 1985)	18
Evans v. Michigan, 133 S. Ct. 1069 (2013)	1, 3, 25, 26
Evans v. United States, 987 A.2d 1138 (D.C. 2010)	13
Garces v. U.S. Atty. Gen., 611 F.3d 1337 (11th Cir. 2010)	19
Green v. United States, 355 U.S. 184 (1957)	22
Johnson v. United States, 544 U.S. 295 (2005)	19
Madsen v. McFaul, 643 F Supp. 2d 962 (N.D. Ohio 2009)	23

TABLE OF AUTHORITIES—Continued

Page(s)

North Carolina v. Pearce,
395 U.S. 711 (1969) 17

Owens v. Addison,
No. 12-CV-0117-CVE-FHM, 2013 WL 1828049 (N.D. Okla. Apr. 30, 2013), *aff'd sub nom. Owens v. Trammell*, 792 F.3d 1234 (10th Cir. 2015)..... 23

People v. Hopkins,
No. 284631, 2009 WL 2244537 (Mich. Ct. App. July 28, 2009)..... 23

People v. Santamaria,
884 P.2d 81 (Cal. 1994) 12

People v. Wilson,
852 N.W.2d 134 (Mich. 2014)..... 10, 11, 18

Poland v. Arizona,
476 U.S. 147 (1986) 17

Simpson v. Motorists Mut. Ins. Co.,
494 F. 2d 850 (7th Cir. 1974) 18

Skilling v. United States,
561 U.S. 358 (2010) 21

State v. Halstead,
791 N.W.2d 805 (Iowa 2010)..... 11, 12

State v. Kelly,
992 A.2d 776 (N.J. 2010)..... 13

State v. Montoya,
306 P.3d 426 (N.M. 2013)..... 11

TABLE OF AUTHORITIES—Continued

Page(s)

United Bhd. of Carpenters & Joiners v. Operative Plasterers' & Cement Masons' Int'l Ass'n, 721 F.3d 678 (D.C. Cir. 2013) 18

United States v. Bailin, 977 F.2d 270 (7th Cir. 1992) 22

United States v. Cabrera, 804 F. Supp. 2d 1261 (M.D. Fla. 2011) 23

United States v. Citron, 853 F.2d 1055 (2d Cir. 1988) 13

United States v. Fernandez, 722 F.3d 1 (1st Cir. 2013) 2

United States v. Lacey, 982 F.2d 410 (10th Cir.1992) 18

United States v. Powell, 469 U.S. 57 (1984) ..... *passim*

United States v. Russell, 221 F.3d 615 (4th Cir. 2000) 18

Yates v. United States, 135 S. Ct. 1074 (2015) 21

Yeager v. United States, 557 U.S. 110 (2009) ..... *passim*

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V. 1

STATUTES

18 U.S.C. § 371 4

TABLE OF AUTHORITIES—Continued

Page(s)

18 U.S.C. § 666 ..... *passim*

18 U.S.C. § 921(a)(20) 19

18 U.S.C. § 1952(a)(3)(A) 4

28 U.S.C. § 1254(1) 1

OTHER AUTHORITIES

Federal Judicial Caseload Statistics (Mar. 31, 2014), Table D-4, http://www.uscourts.gov/file/10657/download 22

John S. Baker, Jr., Revisiting the Explosive Growth of Federal Crimes, Heritage Foundation Legal Memorandum 26 (June 16, 2008) 20

OPINIONS BELOW

The First Circuit's opinion is reported at 790 F.3d 41. Pet. App. 1a-40a. The district court's opinion is reported at 988 F. Supp. 2d 191. Pet. App. 41a-53a.

JURISDICTION

The First Circuit issued its decision on June 15, 2015. Pet. App. 1a. Petitioners filed a timely petition for rehearing en banc, which the court denied on July 27, 2015. *Id.* at 134a-135a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

STATEMENT

This case is an ideal vehicle to resolve a deep and acknowledged conflict on a recurring question of national importance concerning the Fifth Amendment's Double Jeopardy Clause. Widening a 5-3 split, the First Circuit held that an unlawful, vacated conviction nullifies the bar against a criminal defendant being twice put in jeopardy for the same offense. That holding turns on the interplay between three of this Court's decisions.

In *Ashe v. Swenson*, 397 U.S. 436 (1970), this Court held that the collateral estoppel aspect of the Double Jeopardy Clause bars a new prosecution that depends on a fact necessarily decided in the defendant's favor by an earlier acquittal. In *United States v. Powell*, 469 U.S. 57 (1984), the Court held that, in a single trial,

the jury's acquittal on one count does not invalidate the jury's valid conviction on another count, even if the conviction is logically inconsistent with the acquittal. And in *Yeager v. United States*, 557 U.S. 110 (2009), the Court held that when a jury acquits on one count and hangs on another, the acquittal retains preclusive effect under *Ashe* and prevents retrial of the hung count—even if the acquittal was logically inconsistent with the hung count. The question here is whether, for purposes of *Ashe*'s collateral estoppel analysis, a vacated conviction that is logically inconsistent with an accompanying acquittal is more like the valid conviction in *Powell* or the hung count in *Yeager*.

Federal courts of appeals and the States' highest courts are hopelessly divided on this question. The question is significant and recurring because prosecutors routinely pile on charges upon charges, either to obtain leverage against defendants or to increase the chances the jury will convict at least on something. The more charges, however, the more likely the trial will result in split, inconsistent verdicts and reversible trial errors. This case well illustrates the point.

The United States brought multiple bribery-related charges against petitioners Juan Bravo-Fernandez and Hector Martínez-Maldonado arising out of a single weekend trip to Las Vegas, worth perhaps a couple thousand dollars at most. The jury acquitted petitioners of conspiring and traveling to violate 18 U.S.C. § 666, which prohibits federal program bribery, but illogically convicted them of the predicate § 666 offense. The First Circuit vacated the § 666 convictions because they rested on improper jury instructions that allowed for conviction on a gratuity theory, even though the statute prohibits only bribes. *United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013).

The prosecutors sought to retry petitioners under § 666, even though petitioners already had served significant terms of imprisonment under the now-vacated convictions. Petitioners sought to bar re-prosecution, arguing that, under *Ashe* and *Yeager*, the acquittals for conspiracy and traveling depended on a finding that petitioners did not violate § 666, and the acquittals thus barred the government from re-prosecuting petitioners for violating § 666. Petitioners argued that *Powell* was irrelevant because it concerned valid convictions, not vacated convictions.

The First Circuit nonetheless extended *Powell* and held that petitioners' vacated, unconstitutional convictions deprived the acquittals of their otherwise preclusive effect and thus deprived petitioners of the protections of the Double Jeopardy Clause.

The decision below squarely conflicts with decisions of the Michigan, New Mexico, and Iowa Supreme Courts. It is irreconcilable with both *Yeager* and the hornbook rule that a vacated conviction is a legal nullity, ineffective for any purpose. And by eliminating the consequences that otherwise would flow from split verdicts, the First Circuit's decision creates perverse incentives for prosecutors both to bring duplicative charges and to advocate overreaching interpretations of criminal statutes. This Court's review is needed to resolve the conflict and correct the First Circuit's erroneous decision.

Certiorari is independently warranted to review the First Circuit's refusal to give preclusive effect to a judgment of acquittal the district court entered after receiving the court of appeals' mandate in the earlier appeal. The court below permitted the district court to retract that acquittal, adopting the precise test that this Court rejected in *Evans v. Michigan*, 133 S. Ct. 1069 (2013).

A. The Jury Issues a Split Verdict

On June 22, 2010, a federal grand jury indicted petitioners Bravo, the president of a private security firm in Puerto Rico, and Martínez, then a member of the Puerto Rico senate, on a series of bribery-related charges in connection with their trip to a Las Vegas boxing match in May 2005. The government alleged that Bravo paid some of Martínez's expenses for the trip—totaling perhaps a couple thousand dollars—in connection with Martínez's support of two senate bills related to the security industry in Puerto Rico. Pet. App. 3a, 61a-63a. The senate later overwhelming passed the bills by votes of 26-1 and 24-1. COA Joint App. 246, 250. The government nonetheless charged petitioners with a panoply of federal crimes: (1) committing federal program bribery, in violation of 18 U.S.C. § 666; (2) conspiring (a) to violate § 666 and (b) to travel in interstate commerce in aid of racketeering, in violation of 18 U.S.C. § 371; and (3) traveling in interstate commerce to further violations of (a) § 666 and (b) Puerto Rico bribery statutes, in violation of 18 U.S.C. § 1952(a)(3)(A). Pet. App. 3a-4a, 63a.

At the government's urging and over petitioners' objection, the court instructed the jury that § 666 criminalizes not only quid pro quo bribery, but also mere gratuities. *Id.* at 89a. The government's closing argument thus encouraged the jury to convict on the theory that Bravo paid Martínez a gratuity in violation of § 666. *Id.*

On March 7, 2011, after the three-week trial, the jury acquitted Bravo and Martínez of conspiring to violate § 666, and of traveling in interstate commerce to further a violation of § 666. But the jury convicted both petitioners of violating § 666. The jury also convicted Bravo of conspiring to travel in furtherance of "unspecified 'racketeering' activity," and traveling in furtherance of a violation of Puerto Rico bribery statutes, but acquitted Martínez of those offenses. *Id.* at 4a, 64a.

The district court granted Bravo's motion for judgment of acquittal on the charge of traveling to further a violation of Puerto Rico bribery statutes, because Puerto Rico repealed the statutes at issue before the petitioners went to Las Vegas. *Id.* at 110a-111a. The court explained that "Bravo cannot be convicted of conduct that was effectively not a crime at the time the offense took place." *Id.* at 111a (quoting district court).

The district court sentenced both petitioners to 48 months of imprisonment, and imposed a fine of $175,000 on Bravo and $17,500 on Martínez. *Id.* at 64a. The court denied petitioners' motions for bail pending appeal. Martínez began serving his sentence on March 1, 2012, and Bravo began serving his sentence on May 7, 2012. *Id.* at 64a n.4.

B. The First Circuit Reverses or Vacates All Convictions

In 2013, a panel of the First Circuit reversed or vacated each remaining conviction. Pet. App. 4a, 60a. First, the court reversed Bravo's conviction for conspiring to travel to further "unspecified 'racketeering'

activity," because the court found that the only potential predicates for this charge were invalid. *Id.* at 4a, 108a-120a.

Second, and key here, the court vacated Bravo and Martínez's convictions for violating § 666, because they resulted from unlawful jury instructions. *Id.* at 5a, 81a-105a. The court held that § 666 criminalizes only quid pro quo "bribes," not mere "gratuities." *Id.* at 102a-103a. The district court's instructions, however, "improperly invited the jury to convict both Martínez and Bravo for conduct involving gratuities rather than bribes." *Id.* at 104a. Likewise, "the government's closing argument improperly invited the jury to convict the [petitioners] on the proscribed 'gratuity theory,' and the evidence presented at trial could support a finding that the 'payment' Bravo gave and Martínez received constituted a gratuity." *Id.* The § 666 convictions thus "violate[d] due process." *Id.* at 105a (quoting *Fiore v. White*, 531 U.S. 225, 228 (2001)).

After oral argument but before issuing a decision, the First Circuit ordered the petitioners' release on bail. But in the meantime, Bravo served 8 months in prison and Martínez served 10 months in prison on the basis of the unlawful convictions. *Id.* at 64a n.4.

C. The District Court Issues and then Retracts a Judgment of Acquittal on All Counts

On October 25, 2013, two days after the First Circuit's mandate issued, the district court entered a line order granting Bravo and Martínez a "judgement of acquittal" on all counts, including "both [petitioners'] section 666 convictions." Pet. App. 5a-6a. Hours later, the government moved "to clarify" the court's judgment, stating that the First Circuit had

only vacated the § 666 convictions, not reversed them, and that the government planned to retry the petitioners on the standalone § 666 counts. *Id.* at 6a. That same day, the court "vacated" its line order, *id.*, on the ground that the "order of acquittal" was "contrary to the Court of Appeals' mandate." *Id.* at 55a. The district court simultaneously issued a new order vacating the § 666 convictions. *Id.* Petitioners moved to reinstate the acquittals, arguing that the Double Jeopardy Clause barred the district court from retracting them. The court denied the motion. *Id.* at 54a-58a.

D. The Decision Below

Bravo and Martínez thereafter moved to preclude retrial of the § 666 charges under the Double Jeopardy Clause. They argued that *Ashe*'s and *Yeager*'s collateral estoppel analysis barred retrial on those charges, because the jury necessarily found that Bravo and Martínez did not violate § 666 in acquitting them of conspiring and traveling to violate § 666. The court denied the motions. Pet. App. 41a-53a.

A panel of the First Circuit affirmed. It was undisputed, the court acknowledged, that the jury's acquittals on conspiring to violate § 666 and traveling to violate § 666 necessarily depended on a finding that neither defendant violated § 666. *Id.* at 12a-15a & n.5. In other words, "a rational jury could [not] have grounded its verdict upon an[y] [other] issue." *Ashe v. Swenson*, 397 U.S. 436, 444 (1970). Under an ordinary double jeopardy analysis, therefore, the Fifth Amendment would prohibit the government from re-prosecuting petitioners on the standalone § 666 charges. *See id.* at 444-46.

But the court of appeals held that the Double Jeopardy Clause did not apply. The court reasoned that the § 666 convictions—which were vacated because they were obtained unlawfully, in violation of the Due Process Clause—divested petitioners of their double jeopardy rights. Pet. App. 15a-20a. The vacated convictions, the court believed, were "part of what the jury decided at trial" and factored into the double jeopardy analysis. *Id.* at 18a-20a. Relying on *Powell*, the court thus concluded that an acquittal has no preclusive effect if the acquittal was logically inconsistent with a vacated conviction. *Id.*

The First Circuit then turned to *Yeager*'s holding that an acquittal retains its preclusive effect even if the acquittal is logically inconsistent with a hung count. *Id.* at 17a-18a. Because "a jury speaks only through its verdict," and not through hung counts, *Yeager* held, hung counts do not bear on what the jury necessarily decided in an *Ashe* analysis. *Id.* at 18a (quoting *Yeager*, 557 U.S. at 121-22). But the court of appeals concluded that vacated convictions are "meaningfully different" from hung counts, *id.* at 17a, because "vacated convictions, unlike hung counts, *are* jury decisions, through which the jury *has* spoken." *Id.* at 18a. Because the court found the acquittals here logically inconsistent with the vacated convictions, the court refused to accord the acquittals preclusive effect. *Id.* at 20a-33a.

The First Circuit acknowledged that "a divided Michigan Supreme Court recently came to the opposite judgment," holding that vacated convictions, like hung counts under *Yeager*, are irrelevant to the collateral estoppel inquiry. *Id.* at 19a-20a (citing *People v. Wilson*, 852 N.W.2d 134 (Mich. 2014)). But the court of appeals found the dissent in the Michigan

case "more persuasive," and accordingly joined two other circuits and two state high courts that likewise hold that a vacated conviction can negate the preclusive effect of an acquittal. *Id.* at 19a-20a & nn.7-8.

The First Circuit then rejected petitioners' separate double jeopardy argument—that the district court's October 25, 2013 judgment of acquittal on all counts barred retrial on the § 666 counts. *Id.* at 37a-39a. The court below acknowledged the "well-established rule that 'the Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is based upon an egregiously erroneous foundation.'" *Id.* at 37a (quoting *Evans*, 133 S. Ct. 1074). But the court below permitted the district court to retract its acquittal here on the theory that the acquittal did not resolve any "factual element[] of the offense charged." *Id.* at 37a-38a (quotation marks omitted).

On July 27, 2015, the First Circuit denied rehearing. *Id.* at 134a-135a. Over the government's objection, the court stayed its mandate pending this Court's resolution of this petition. *Id.* at 136a-137a.

REASONS FOR GRANTING THE PETITION

I. The First Circuit Deepened an Acknowledged Split About the Collateral Estoppel Aspect of the Double Jeopardy Clause

This case presents an ideal opportunity for the Court to resolve a 5-3 split over whether a vacated, unconstitutional conviction can eliminate the preclusive effect of an acquittal under the Double Jeopardy Clause. The First Circuit's decision answering that question in the affirmative is also at odds with this Court's decision in *Yeager* and with the blackletter principle that vacated convictions are legal nullities

with no effect, in any context. The question is squarely presented, outcome determinative in this years-long prosecution, and of enormous significance to federal and state criminal defendants.

A. The Decision Below Conflicts With Decisions of the Supreme Courts of Michigan, New Mexico, and Iowa

1. The First Circuit acknowledged that its decision is directly contrary to the Michigan Supreme Court's decision in *People v. Wilson*, 852 N.W.2d 134 (Mich. 2014). Pet. App. 19a-20a. There, the jury convicted the defendant of felony murder but acquitted him of home invasion, which was the only predicate felony that could support the felony murder conviction. 852 N.W.2d at 136-37. The felony murder conviction was then vacated on appeal for unrelated reasons, and the court held that the acquittal for home invasion collaterally estopped the government from retrying the defendant for felony murder. *Id.* at 139-42.

Wilson held that this Court's decision in *Powell* was not implicated because *Powell* addresses the inconsistency within a single, valid verdict, not "the doctrine of collateral estoppel." *Id.* at 139-40. "It is instead the *Yeager* holding that demonstrates why the prosecution cannot re-try the defendant for felony murder," namely, that re-prosecuting the defendant for "felony murder would [] require the same factual basis as home invasion, for which he was previously and finally acquitted." *Id.* at 140. "The inconsistency in the defendant's initial jury verdict," *Wilson* continued, "does not alter this fundamental principle, given the subsequent appellate reversal of his convictions." *Id.* "[T]he defendant no longer stands convicted, not of anything, not at all." *Id.* "*Yeager* thus

controls: [t]he defendant's reversed felony-murder conviction here must be treated exactly as the hung counts were treated in *Yeager*." *Id.* at 141.

2. The court of appeals' decision below also conflicts with decisions of two other State high courts. Like the Michigan Supreme Court, the New Mexico and Iowa Supreme Courts have held that an acquittal precludes retrial of a vacated conviction, if the acquittal necessarily determined a fact that is an element of the vacated conviction.

In *State v. Montoya*, 306 P.3d 426 (N.M. 2013), the jury acquitted the defendant of second-degree murder, *id.* at 432, but convicted him of felony murder, *id.* at 429. The felony murder conviction was vacated on appeal based on unlawful jury instructions, *id.* at 429-31, and the New Mexico Supreme Court held that the collateral estoppel aspect of the federal Double Jeopardy Clause prohibited retrial, *id.* at 431-32. Under New Mexico law, the court explained, second-degree murder is a lesser-included offense of felony murder. *Id.* Thus, the defendant, "having been acquitted of second-degree murder, is constitutionally protected from further prosecution for that offense," including "as a component of felony murder." *Id.* at 432 (citing *Ashe*, 397 U.S. at 446). And that was so even though the acquittal was by definition inconsistent with the initial, vacated conviction for felony murder. The acquittal retained its preclusive effect.

Similarly, in *State v. Halstead*, 791 N.W.2d 805 (Iowa 2010), the jury convicted the defendant of assault while participating in a felony but acquitted him of first degree theft, the only potential predicate felony. *Id.* at 807. The Iowa Supreme Court vacated the conviction for assault while participating in a

felony on a state law ground.[1] *Id.* at 815-16. The Court then concluded that the collateral estoppel aspect of the federal Double Jeopardy Clause prohibited retrial of that charge. *Id.* at 816 (citing *Ashe*, 397 U.S. at 442-46). "Here, it is clear that the jury has acquitted the defendant of the underlying predicate offenses. We find that collateral estoppel bars any subsequent retrial on the compound felony charge because the factual issues of guilt on the predicate felonies have been authoritatively determined." *Id.* In short, in Iowa, the fact that acquittals conflict with vacated convictions does not deprive them of their preclusive effect.[2]

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[1] The court vacated the conviction because it concluded that, under Iowa law, inconsistent verdicts rendered in the same trial "undermine[] "our confidence in the outcome of the trial." *Id.* at 815. In that respect, the court diverged from this Court's decision in *Powell*. But the decision to vacate under state law did not affect the court's analysis of the separate question presented in this case: whether the vacated conviction could be retried under the federal collateral estoppel principles in *Ashe*. Other state courts that diverge from *Powell* and vacate inconsistent convictions under state law have held that the vacated conviction *does* deprive the acquittal of preclusive effect. *E.g.*, *DeSacia v. State*, 469 P.2d 369, 379-81 (Alaska 1970).

[2] In addition to the cases from Michigan, New Mexico, and Iowa, the California Supreme Court assumed without deciding that an acquittal could bar a retrial on a vacated count, but held that the acquittal did not necessarily determine any issue essential to a conviction on the vacated count. *People v. Santamaria*, 884 P.2d 81, 87-91 (Cal. 1994). The Delaware Supreme Court, applying Delaware law, held that an acquittal for conspiracy precluded a retrial of a vacated conviction for first degree murder on an accomplice theory, because the acquittal necessarily determined that the defendant was not an accomplice. *Banther v. State*, 884 A.2d 487, 495 (Del. 2005).

3. Departing from the Michigan, New Mexico, and Iowa decisions, the First Circuit below instead joined two other circuits and two other state high courts that hold that vacated convictions can divest defendants of the protections of the Double Jeopardy Clause. Pet. App. 19a (citing *United States v. Citron*, 853 F.2d 1055, 1059 (2d Cir. 1988); *United States v. Price*, 750 F.2d 363, 366 (5th Cir. 1985); *State v. Kelly*, 992 A.2d 776, 789 (N.J. 2010); *Evans v. United States*, 987 A.2d 1138, 1141-42 (D.C. 2010)).

Like the First Circuit, the New Jersey and D.C. high courts expressly extended *Powell* and rejected the application of *Yeager* adopted by the Michigan Supreme Court. *Kelly*, 992 A.2d at 785-86, 789; *Evans*, 987 A.2d at 1141-43. The Second and Fifth Circuit decisions pre-date *Yeager*. But as the First Circuit explained, by the time of the Second and Fifth Circuit decisions, both courts had already adopted the rule of *Yeager*, that hung counts are irrelevant to the *Ashe* analysis. Pet. App. 19a n.7. And the Second Circuit has continued to follow *Citron* after *Yeager*. *Id.* (citing *United States v. Bruno*, 531 F. App'x 47, 49 (2d Cir. 2013) (unpub.)).[3]

This Court should grant review to resolve the acknowledged conflict.

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[3] Beyond the cases the First Circuit cited for its side of split, the Alaska Supreme Court also has held that an inconsistent vacated conviction deprives an acquittal of its preclusive effect, at least where the conviction was vacated under state law because of the inconsistency. *DeSacia v. State*, 469 P.2d 369, 380-81 (Alaska 1970). But that decision predated *Yeager* and was at a time when Alaska had not otherwise adopted the principle later recognized in *Yeager*.

B. The Decision Below Conflicts With *Yeager* and Other Decisions of this Court

The First Circuit's decision is irreconcilable with this Court's decision in *Yeager*. And the decision violates the longstanding rule—reflected in numerous decisions of this Court and other courts of appeals—that vacated convictions are legal nullities for *all* purposes, including collateral estoppel. There is no principled reason to treat them differently for purposes of collateral estoppel under the Double Jeopardy Clause.

1. *Yeager* holds that a jury's acquittal bars a subsequent prosecution that depends on facts the acquittal necessarily decided in the defendant's favor, full stop. 557 U.S. at 119-20. That the same jury had hung on other counts, and that hanging on those counts was inconsistent with the acquittal, does not undermine the finality of the acquittal or withdraw its preclusive effect. *Id.* at 120. *Yeager* reasoned that the jury's "inability to reach a verdict [on the hung counts] . was a nonevent" because "a jury speaks only through its verdict." *Id.* at 120-21. "Hung counts have never been accorded respect as a matter of law or history, and are not similar to jury verdicts in any relevant sense." *Id.* at 124.

A straightforward application of *Yeager* bars reprosecution of the § 666 counts here. A vacated, unlawful conviction too is a "nonevent" that enjoys no respect as a matter of law or history. It "has been nullified." *Bullington v. Missouri*, 451 U.S. 430, 442 (1981). Like a hung count, a vacated conviction does *not* "bring[] to the criminal process, in addition to the collective judgment of the community, an element of needed finality." *Yeager*, 557 U.S. at 124 (quotation marks omitted). Quite the contrary, a vacated

conviction brings no finality whatsoever, because it no longer exists. If anything, a vacated conviction is *less* meaningful than a hung count. With a hung count, at least some jurors thought that the government had proven the determinative fact under the relevant law. With a conviction vacated for faulty jury instructions, one cannot say that *any* juror thought the government had proven *anything*.

Indeed, the First Circuit's decision vacating the § 666 convictions presumes that the faulty instructions potentially affected jurors' decisions. With proper instructions, the jury at a minimum might have hung on the § 666 counts, in which case *Yeager* would control. But the illegal jury instructions eliminated the possibility of a hung jury.

Nevertheless, the First Circuit below reasoned that under *Powell*, a vacated conviction eliminates the preclusive effect of an inconsistent acquittal for purposes of a subsequent prosecution. But *Powell* did not involve either a vacated conviction or a subsequent prosecution. *Powell* applied, rather, the longstanding rule on inconsistent verdicts—an acquittal does not undermine a *simultaneously rendered, valid* conviction. The Court reasoned that the valid, final judgment of conviction is entitled to respect because it is a final judgment. *Powell* thus does not mean that a valid conviction undermines the preclusive effect of an acquittal on *open* counts, nor does it suggest that an *invalid* conviction is entitled to any respect for purposes of a retrial.

As *Yeager* later explained: "*Powell* . . declined to use a clearly inconsistent verdict [*i.e.*, the acquittal] to second-guess the soundness of another verdict [*i.e.*, the conviction]." 557 U.S. at 125. "[T]hen, *a fortiori*, a

potentially inconsistent hung count could not command a different result," *i.e.*, could not be used to second-guess the soundness of the acquittal whose preclusive effect was at issue in *Yeager*. *Id.* That analysis applies equally here: "*a fortiori*," a potentially inconsistent vacated judgment cannot "command a different result" and second-guess the soundness of the acquittal.

The court below declined to apply *Yeager*'s reasoning, noting that "while a vacated conviction, like a hung count, is not a final jury verdict, *Yeager* did not rely solely on a respect-for-finality rationale." Pet. App. 18a. But that analysis misconstrues both the Court's holding in *Yeager* and its underlying rationale. This Court said finality is the decisive issue: "We must determine whether the interest in preserving the finality of the jury's judgment on the [acquitted] fraud counts . . . bars a retrial on the insider trading counts." 557 U.S. at 118.

In any event, the decision below is equally inconsistent with *Yeager*'s discussion of the difficulty of deciphering hung counts, the aspect of *Yeager* the First Circuit thought more significant. The court below concluded that, although there is "no way to decipher what a hung count represents" because "a jury speaks only through its verdict," Pet. App. 18a (quoting *Yeager*, 557 U.S. at 121-122), "vacated convictions, unlike hung counts, *are* jury decisions, through which the jury *has* spoken," albeit under an erroneous view of the law. *Id.* The notion that a jury "speaks" through an unconstitutional conviction secured through faulty instructions that has been vacated as contrary to due process is anathema to our legal system. Imagine if the jury had been told it could convict under a preponderance of the evidence

standard, or was wrongly instructed on all but one element of the offense. In any event, a vacated conviction is *not* a "jury decision." Rather, this Court repeatedly has stated that, when a conviction is vacated, "the slate [is] wiped clean." *Poland v. Arizona*, 476 U.S. 147, 152 (1986) (quoting *Bullington*, 451 U.S. at 442)). Indeed, the First Circuit vacated the convictions in this case precisely because that court could not say "with fair assurance" that the jury had agreed that petitioners were guilty under the correct understanding of § 666. Pet. App. 104a-105a.

The court below theorized that a vacated conviction strips an acquittal of its preclusive effect because the vacated conviction "may still suggest that an acquittal with which that conviction conflicts was the result of 'mistake, compromise, or lenity.'" *Id.* at 18a (quoting *Powell*, 469 U.S. at 65). But that notion did not carry the day in *Yeager*. Where an acquittal rests on a factual finding that logically required an acquittal on a hung count, one can equally say that "the conflicting dispositions are irrational—the result of 'mistake, compromise, or lenity.'" 557 U.S. at 132 (Scalia, J., dissenting) (quoting *Powell*, 469 U.S. at 65).

2. Beyond *Yeager*, the First Circuit's decision runs headlong into the hornbook rule that, when a conviction is vacated because it was obtained in violation of the Constitution, the conviction has "been wholly nullified and the slate wiped clean." *North Carolina v. Pearce*, 395 U.S. 711, 721 (1969); *see Bullington*, 451 U.S. at 442 (same). But here, the court invoked a conviction that violated the Due Process Clause to deprive petitioners of the protections of the Double Jeopardy Clause. That holding has dangerous implications that independently warrant this Court's review.

Across a variety of contexts, courts refuse to give effect to an invalid judgment, especially where that judgment is constitutionally defective. Most notably, "a judgment which is vacated, for whatever reason, is deprived of its conclusive effect as collateral estoppel." *Dodrill v. Ludt*, 764 F.2d 442, 444 (6th Cir. 1985). If a criminal judgment is found unconstitutional, even on "grounds having no bearing on the validity of the fact-findings," that "reversal . . . vacates the judgment entirely, technically leaving nothing to which [courts] may accord preclusive effect." *Id.* When a criminal defendant "won his appeal and the judgment was vacated, all [adverse] factual determinations were vacated with it, and their preclusive effect surrendered." *Id.* at 444-45. The Seventh Circuit likewise has held that a vacated judgment is "a nullity and was hardly admissible" even as *evidence* supporting the formerly victorious party in a subsequent proceeding. *Simpson v. Motorists Mut. Ins. Co.*, 494 F.2d 850, 864 (7th Cir. 1974).

Other courts of appeals are in accord. *See United Bhd. of Carpenters & Joiners v. Operative Plasterers' & Cement Masons' Int'l Ass'n*, 721 F.3d 678, 691 (D.C. Cir. 2013) ("A judgment vacated either by the trial court or on appeal has no estoppel effect in a subsequent proceeding."); *United States v. Lacey*, 982 F.2d 410, 412 (10th Cir. 1992) (same).

The rule that vacated convictions have no collateral estoppel effect is merely one example of a categorical, equally well-settled rule: a "vacated conviction [may not] be used to the defendant's detriment." *Wilson*, 852 N.W.2d at 141 n.5. A vacated conviction may not be used to impeach a criminal defendant. *United States v. Russell*, 221 F.3d 615, 622 (4th Cir. 2000). A

vacated conviction may not be used to enhance a sentence. *Johnson v. United States*, 544 U.S. 295, 303 (2005). A vacated conviction may not be used as the predicate for a felon-in-possession charge. 18 U.S.C. § 921(a)(20). "[T]he vacatur of a conviction because of a constitutional, statutory, or procedural defect in the underlying criminal proceedings [means] there is no longer a 'conviction' for immigration purposes." *Garces v. U.S. Atty. Gen.*, 611 F.3d 1337, 1344 (11th Cir. 2010).

In this case, the First Circuit reasoned that, though a "vacated conviction has been 'nullified,'" Pet. App. 16a (quoting *Bullington*, 451 U.S. at 442), "the 'fact of the conviction'" remains, "[a]nd it is the 'fact of the conviction,' and not its 'attendant legal disabilities,' that is relevant to the *Ashe* analysis." *Id.* (quoting *United States v. Crowell*, 374 F.3d 790, 792 (9th Cir. 2004)) (citation omitted). But it is not the "fact of the conviction" that the First Circuit took into account. It was the underlying factual determinations the court of appeals held were reflected in the vacated convictions. That is why the court devoted 20 pages of its opinion to exploring what the jury "necessarily decided" when it convicted the petitioners on the basis of unlawful instructions. *Id.* at 20a-33a. Reciting the "fact of the conviction" would have taken one sentence. And it is cold comfort to tell a defendant that his vacated conviction is not being used to impose any "attendant legal disabilit[y]," *id.* at 16a, when the vacated conviction is the sole reason that he remains exposed to a criminal charge carrying a 10-year sentence.

Under the First Circuit's rule, the government may retry petitioners *only* because the government previously obtained illegal convictions based on illegal

jury instructions. This holding raises serious due process concerns, casts doubt on well-settled precedent declaring illegal convictions to be nullities, and creates perverse incentives for the government in future cases to pile on duplicative charges in the hopes that one of them will stick (even if later reversed).

C. The Question Presented Is Important and Recurring, and this Case Is an Ideal Vehicle

The Double Jeopardy Clause "embodies . . . vitally important interests," and this Court accordingly has "decided an exceptionally large number of cases interpreting" it. *Yeager*, 557 U.S. at 117. And as the First Circuit recognized, "[t]his appeal raises important . . . issues." Pet. App. 2a.

1. The question whether an unlawful conviction deprives a lawful acquittal of its preclusive effect is a matter of immense significance to criminal defendants and to the administration of justice in this country. This Court has recognized that the "extraordinary proliferation of overlapping and related statutory offenses" has made it "possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Ashe*, 397 U.S. at 445 n.10. One study has found that Congress creates 500 new crimes per decade. John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation Legal Memorandum 26 (June 16, 2008). The collateral estoppel doctrine prevents "the potential for unfair and abusive reprosecutions" enabled by this multiplicity of statutory offenses. *Ashe*, 397 U.S. at 445 n.10.

Exacerbating the issue is Congress's penchant for enacting broadly-worded criminal prohibitions and the government's penchant for pushing interpretations even broader than Congress imagined. The government frequently wins convictions under graspingly expansive theories that are later rejected on appeal, forcing defendants to undergo the expense and anxiety of a second trial premised on a proper interpretation of the statute. *See, e.g.*, *Yates v. United States*, 135 S. Ct. 1074 (2015) (Sarbanes-Oxley did not prohibit destruction of fish); *Bond v. United States*, 134 S. Ct. 2077 (2014) (statute implementing chemical weapons treaty did not cover domestic dispute); *Skilling v. United States*, 561 U.S. 358 (2010) (honest services fraud statute did not reach beyond bribes and kickbacks); *Cleveland v. United States*, 531 U.S. 12 (2000) (federal mail fraud statute did not cover state license applications).

This prosecution exemplifies both problems. The allegedly criminal conduct in this case was a single trip to Las Vegas, worth perhaps a couple thousand dollars. Pet. App. 62a-63a. On the basis of the trip the government charged Bravo and Martínez with multiple felonies: federal program bribery, traveling in interstate commerce in aid of federal program bribery, conspiring to commit federal program bribery, and conspiring to travel in interstate commerce in aid of federal program bribery, not to mention additional counts alleging violations of *repealed* Puerto Rico statutes.

Simultaneously, and over petitioners' vehement objections, the government sought instructions permitting the jury to convict petitioners of federal program bribery under a gratuity theory, rather than a bribery theory. The government argued the gratuity

theory to the jury in closing, and won a conviction based on that unlawful theory. *Id.* at 104a.

Absent intervention by this Court, the rule adopted by the First Circuit will encourage prosecutors simultaneously to overcharge and to push for far-reaching interpretations of criminal statutes, as the prosecutors did here. Prosecutors will overcharge as a form of insurance against the possibility of an acquittal on any particular count. They know that if they do, the odds are in their favor: Excluding defendants whose charges are dismissed pre-trial, 99.6% of federal criminal defendants in this country are convicted.[4] And prosecutors will push for broad interpretations of criminal statutes knowing that if their interpretation is rejected on appeal, they can simply retry the case—this time with the "opportunity to hone [their] presentation on those issues which have already been decided against" them. *United States v. Bailin*, 977 F.2d 270, 277-78 (7th Cir. 1992). From the government's perspective, trial becomes a coin toss where it is heads I win, tails I get a do-over.

Permitting the government to have multiple bites at the apple also increases the likelihood of wrongful convictions of the innocent. *Green v. United States*, 355 U.S. 184, 187-88 (1957). In this case, for example, the jury necessarily determined that petitioners *did not commit bribery*—the crime the government now wants to retry. Pet. App. 12a-15a n.5. Yet the First Circuit gave the government another chance because the government brought duplicative charges and won an unlawful conviction under an unlawful theory.

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[4] Federal Judicial Caseload Statistics (Mar. 31, 2014), Table D-4, http://www.uscourts.gov/file/10657/download.

Letting the decision below stand sanctions and rewards the government's abusive charging decisions.

2. The question presented recurs frequently. Beyond the courts in the 5-3 split, numerous decisions of federal district courts and lower state courts likewise have grappled with the question whether an acquittal precludes retrial of a vacated charge that depends on facts necessarily decided by the acquittal.[5]

Notably, the issue is recurring in large part because lower courts are in disagreement over the interplay between three decisions of this Court—*Ashe*, *Yeager*, and *Powell*. This Court often accepts review "where the decision below is premised upon a prior Supreme Court opinion whose implications are in need of clarification." Shapiro et al., Supreme Court Practice 254 (10th ed. 2013). Only this Court can clarify how

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[5] *See, e.g.*, *United States v. Cabrera*, 804 F. Supp. 2d 1261, 1267-71 (M.D. Fla. 2011) (prohibiting retrial of money laundering counts after convictions were vacated for instructional error, because acquittals on money wire fraud counts necessarily determined that defendant was innocent of an essential element of the money laundering counts); *Madsen v. McFaul*, 643 F Supp. 2d 962, 969-71 (N.D. Ohio 2009) (prohibiting retrial of kidnapping count after conviction was vacated based on ineffective assistance of counsel, because acquittal on rape charges decided a fact critical to the kidnapping charge); *Owens v. Addison*, No. 12-CV-0117-CVE-FHM, 2013 WL 1828049, at *8 (N.D. Okla. Apr. 30, 2013), *aff'd sub nom. Owens v. Trammell*, 792 F.3d 1234 (10th Cir. 2015) (holding that petitioner could be retried on vacated felony murder charge though he had been acquitted of the underlying felony); *People v. Hopkins*, No. 284631, 2009 WL 2244537, at *2 & n.2 (Mich. Ct. App. July 28, 2009) (vacating conviction for possession of a firearm during a felony for instructional error, and barring retrial because the defendant had been simultaneously acquitted of predicate felonies).

the Double Jeopardy Clause operates in this important context.

3. This case offers an ideal vehicle to consider the question presented. It is a direct appeal from a First Circuit decision that thoroughly examines the issue. This question is outcome-determinative. There is also no dispute that, in acquitting petitioners of conspiring to commit federal program bribery and traveling to commit federal program bribery, the jury necessarily determined that petitioners did not commit federal program bribery. Pet. App. 15a n.5 (the government "does not argue" that the acquittals rested on some other ground). In other words, if the Court sides with petitioners and holds that the vacated conviction is irrelevant to the collateral estoppel inquiry, this case ends.

Indeed, presumably recognizing that this case was a likely candidate for this Court's review, the First Circuit over the government's objection stayed its mandate, thereby prohibiting the government from attempting to retry this case pending this Court's decision on the petition for certiorari. This Court should grant the petition and resolve the division between federal circuit courts and state courts of last resort.

II. The Decision Below Permitting Retraction of a Judgment of Acquittal Conflicts With this Court's Decision in *Evans v. Michigan*

Certiorari is also warranted because this Court's precedent barred the district court from "withdrawing" its judgment of acquittal.

"[T]he Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is 'based upon an egregiously erroneous foundation,'" such as an "'erroneous interpretations of governing legal principles.'" *Evans*, 133 S. Ct. at 1074 (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962), and *United States v. Scott*, 437 U.S. 82, 98 (1978)). "[T]he relevant distinction is between judicial determinations that go to 'the criminal defendant's lack of criminal culpability,' and those that hold 'that a defendant, although criminally culpable, may not be punished because of a supposed' procedural error,'" such as pre-indictment delay. *Id.* at 1077 (quoting *Scott*, 437 U.S at 98). The question is whether the trial court's action "'serve[s]' substantive 'purposes' or procedural ones." *Id.* at 1078 (quoting *Scott*, 438 U.S. at 98 n.11).

The court below held that the district court's judgment of acquittal was not "substantive" because it did not "'represent[] a resolution . . . of some or all of the factual elements of the offense charged.'" Pet. App. 37a-38a (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)). But *Evans* rejected this precise test, which "reads *Martin Linen* too narrowly, and it is inconsistent with our decisions since then." *Evans*, 131 S. Ct. at 1077.

The First Circuit below never evaluated whether the district court's acquittal turned on a "procedural" error, as *Evans* requires, and it plainly did not. The First Circuit's decision in the first appeal reflected a substantive determination that "the jury explicitly rejected allegations that either the conspiracy or the Travel Act conduct implicated § 666." Pet. App. 120a. The court of appeals did not rule for petitioners on the basis of any "procedural" issue. And the order

acquitting petitioners reflected the district court's reading of the substantive determination in the first appeal. Even "erroneous interpretations of governing legal principles" still trigger Double Jeopardy. *Evans*, 133 S. Ct. at 1074.

To the extent the district court's judgment of acquittal may fall somewhere between what the Court has described as "substantive" versus "procedural," the Court should grant review to provide guidance for future cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 23, 2015

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[Filed: 6/15/2015]

Nos. 14-1089, 14-1091

UNITED STATES OF AMERICA,
Appellee,

v.

JUAN BRAVO-FERNANDEZ and
HECTOR MARTÍNEZ-MALDONADO,
Defendants, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Francisco A. Besosa, *U.S. District Judge*]

Before Howard, Lipez, and Barron, *Circuit Judges*.

Martin G. Weinberg, with whom *David Z. Chesnoff*, *Chesnoff & Schonfeld*, and *Kimberly Homan* were on brief, for appellant Juan Bravo-Fernandez.

Abbe David Lowell, with whom *Christopher D. Man* and *Chadbourne & Park LLP* were on brief, for appellant Hector Martínez-Maldonado.

Vijay Shanker, United States Department of Justice, Criminal Division, Appellate Section, with whom *Leslie R. Caldwell*, Assistant Attorney General, *David A. O'Neil*, Acting Deputy Assistant Attorney General, and *Peter M. Koski*, United States Department of

Justice, Criminal Division, Public Integrity Section, were on brief, for appellee.

June 15, 2015

BARRON, *Circuit Judge*. This appeal raises important and, in our Circuit, novel issues about when an acquittal in an earlier trial may be deemed to bar, under the Double Jeopardy Clause, a new prosecution on a related offense. The legal issues arise in connection with the federal bribery prosecutions of a former member of the Puerto Rico Senate and of the former president of a Puerto Rico private security firm.

We last considered these prosecutions two years ago following a trial at which the defendants had been convicted of federal program bribery under 18 U.S.C. § 666. *See United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013). At that time, we vacated the convictions because the jury had received improper instructions about what constituted "bribery" under that statute. *Id.* at 18-27. We thus remanded for a possible new trial based on a proper theory of liability under § 666. *Id.*

In this appeal, the defendants contend that the new trial may not begin because the renewed prosecutions violate the Double Jeopardy Clause, which provides that "[n]o person [may] be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. In pressing this contention, the defendants make two arguments.

The defendants first argue that the Double Jeopardy Clause bars the renewed prosecutions because the jury acquitted on closely related offenses in the earlier trial and, in doing so, necessarily found that the government

failed to prove issues that the government would have to relitigate in the new prosecutions. Separately, the defendants contend that the Double Jeopardy Clause bars the renewed prosecutions because a line order that the District Court issued and then corrected days after we issued our mandate in the last appeal constituted a final and irrevocable order of acquittal on the renewed § 666 charges.

The District Court rejected both double jeopardy arguments, and so do we. We thus affirm the District Court.

I.

For purposes of the issues before us in this appeal, it is the procedural history of the case that matters most. And so we provide the relevant details of that history here.

The § 666 charges are based on a trip from Puerto Rico to Las Vegas that defendant Juan Bravo-Fernandez took with defendant Hector Martínez-Maldonado in May of 2005. The two men had traveled to Las Vegas to see boxer "Tito" Trinidad fight boxer "Winky" Wright. At the time, Bravo was the president of Ranger American, a private security firm in Puerto Rico. Martínez was a member of the Puerto Rico Senate.

A grand jury indicted the defendants in June of 2010, finding probable cause for the government's allegations concerning the connection between Bravo's payment for the trip and Martínez's support for legislation beneficial to Bravo's company. The indictment contained a number of distinct counts. These counts included violations of the federal program bribery statute, 18 U.S.C. § 666, violations of the Travel Act, 18 U.S.C. § 1952(a)(3)(A), and conspiracy, 18 U.S.C. § 371.

The Travel Act prohibits travel in interstate commerce for a criminal purpose, 18 U.S.C. § 1952(a)(3)(A). In this instance, the government alleged that the criminal purpose was both to commit the bribery that § 666 prohibits and to violate Puerto Rico bribery law.[1] The predicate offenses for the conspiracy counts were the Travel Act (in furtherance of, according to the indictment, violations of § 666 and Puerto Rico bribery law) and § 666.

After a three week trial in 2011, the jury returned split verdicts as to each defendant. The jury convicted each defendant of federal program bribery under § 666. The jury acquitted each defendant of conspiracy to violate § 666 and of violating the Travel Act in furtherance of violating § 666. In addition, the jury convicted Bravo of two other offenses: conspiring to violate the Travel Act in furtherance of (according to the verdict form[2]) unspecified "racketeering" activity, and violating the Travel Act in furtherance of violating Puerto Rico bribery law. The jury acquitted Martínez of those last two offenses. The defendants appealed each of the convictions.

In *Fernandez*, we considered the defendants' appeal and reversed or vacated all of the convictions. *Fernandez*, 722 F.3d at 39. We reversed those of Bravo's convictions that were based on Puerto Rico bribery law as predicate offenses. We did so because we held that those bribery laws had been repealed before Bravo had committed the relevant acts underlying the convictions. *Id.* at 28-34.

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[1] *See* P.R. Laws Ann. tit. 33 §§ 4360, 4363 (repealed 2005).

[2] Unlike the indictment, the verdict form did not specify § 666 and Puerto Rico bribery law as the predicate offenses for the conspiracy to violate the Travel Act charges.

We also vacated Bravo's and Martínez's convictions on the standalone § 666 counts. *Id.* at 27. Specifically, we concluded that § 666 required the government to prove that Bravo had paid for Martínez's trip to the boxing match "in exchange for" the future actions that Martínez allegedly took with respect to the legislation favoring Bravo's company. *Id.* at 19. We concluded, however, that the jury instructions allowed the jury to find a violation of § 666 even if the government failed to prove this "exchange" theory and instead proved only what we called a "gratuity" theory. *Id.* at 26-27 Under this improper gratuity theory, the government needed only to prove that Bravo had given, and Martínez had received, "a reward for" having already supported the two bills that favored Bravo's company *Id.* at 20.

After holding that the jury instructions were improper in this respect, we further concluded that the evidence supported not only the correct exchange theory but also the improper gratuity theory. *Id.* at 26-27. We thus held that the error in the jury instructions was not harmless. *Id.* On that basis, we vacated the convictions on the standalone § 666 counts. *Id.* at 27. We then remanded for possible re-prosecution of the standalone § 666 counts under that same indictment. *Id.* at 27-28. In doing so, we explained that "[t]he government may not pursue a conviction" for the § 666 counts on a gratuity theory "if [d]efendants are retried." *Id.* at 28.

Our mandate in *Fernandez* issued on October 23, 2013. The District Court assumed jurisdiction once again. Two days later, on October 25, unprompted by any party, the District Court entered a line order. That line order stated:

> ORDER re 639 U.S.C.A. Judgment and 640 U.S.C.A. Judgment as to Juan Bravo-Fernandez and Hector Martinez-Maldonado. The mandate having been issued (Docket No. 641), in accordance with the Judgments of the Court of Appeals (Docket Nos. 639 and 640), a judgment of acquittal shall be entered as to defendant Martinez's conspiracy count, as to defendant Bravo's conspiracy conviction, and as to both defendants' section 666 convictions. Signed by Judge Francisco A. Besosa on 10/25/2013.

Within hours, the government filed an emergency motion "to clarify" the District Court's line order. The government contended in that motion that the last clause of the line order was mistaken. The government explained—correctly, all parties to this appeal agree—that this Court's opinion in *Fernandez*, in vacating the standalone § 666 convictions, "did not order [the District Court] to enter a judgment of acquittal on the § 666 convictions."

Less than three hours after entry of the initial line order, and following the receipt of the government's motion, the District Court vacated that order. The District Court's new order specified that "[t]he defendants' section 666 convictions are VACATED."

The defendants then moved to "reinstate" the by-then vacated line order. The defendants argued that the line order constituted a judgment of acquittal that, given the Double Jeopardy Clause, could not be taken back. But the District Court disagreed and denied the motion.

Shortly thereafter, the defendants filed a new motion for acquittal on the standalone § 666 charges. In this motion, the defendants focused on the split jury verdicts. The defendants contended that, under the Double Jeopardy Clause, the acquittals of the defendants for conspiracy to violate § 666 and for violating the Travel Act in furtherance of a § 666 offense precluded any renewed prosecution on the standalone § 666 counts. The District Court denied that motion, too.

The defendants now appeal the District Court's denial of the two acquittal motions. We have appellate jurisdiction under our authority to review "pretrial orders rejecting claims" under the Double Jeopardy Clause. *Abney v. United States*, 431 U.S. 651, 662 (1977). We review the "constitutional questions" raised de novo. *United States v. Lanoue*, 137 F.3d 656, 661 (1st Cir. 1998) (citing *United States v. Aguilar-Aranceta*, 957 F.2d 18, 21 (1st Cir. 1992), *abrogated on other grounds*, *Yeager v. United States*, 557 U.S. 110, 119 (2009)).

II.

We start by addressing the defendants' arguments about the preclusive effect of the § 666-based Travel Act and conspiracy acquittals.[3] The defendants' arguments rely on "the rule of collateral estoppel" that "is embodied in the Fifth Amendment guarantee against double jeopardy." *Ashe v. Swenson*, 397 U.S. 436, 444-

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[3] The government does not argue that the defendants waived this challenge by failing to raise it in *Fernandez*. *See United States v. Medina-Villegas*, 700 F.3d 580, 585 (1st Cir. 2012) ("The law of the case doctrine 'bars a party from resurrecting issues that either were, or could have been, decided on an earlier appeal.'" (quoting *United States v. Matthews*, 643 F.3d 9, 12-13 (1st Cir. 2011))). We thus address the challenge, as the defendants' failure to raise it in *Fernandez* does not affect our jurisdiction to consider it. *See Cohen v. Brown Univ.*, 101 F.3d 155, 168 (1st Cir. 1996).

45 (1970). Before considering whether that rule applies in this case, however, we need to say more about how the rule applies generally.

This aspect of the Double Jeopardy Clause ensures that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. In *Ashe*, the Supreme Court made clear that the rule "is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book." 397 U.S. at 444. The inquiry, instead, "'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Ashe*, 397 U.S. at 444 (quoting *Sealfon v. United States*, 332 U.S. 575, 579 (1948)).

To that end, *Ashe* instructs that we must "'examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" *Id.* (quoting Daniel K. Mayers & Fletcher L. Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 38-39 (1960)). And, if a review of all that material shows that a "rational jury," as a practical matter, decided adversely to the government an issue to be relitigated in the new prosecution, then the defendant gets the benefit of collateral estoppel. *See id.* In other words, under the rule, the government may not "relitigat[e] any issue that was necessarily decided by a jury's acquittal in a prior

trial," even in a trial for a different offense.[4] *Yeager* 557 U.S. at 119 (discussing *Ashe*, 397 U.S. at 445-46).

Ashe supplies a good example of what it means to "set in a practical frame" the inquiry into what the jury necessarily decided. *Id.* at 444 (quoting *Sealfon*, 332 U.S. at 579). There, the jury had acquitted a defendant of the robbery of one victim in the basement of a home in a case that involved the robbery of multiple victims in that home at that same time. *Id.* at 437-38. The new prosecution of that defendant focused on a different one of the victims. *Id.* at 439-40. In that respect, the new prosecution involved a distinct offense. But the Court still concluded that the prior acquittal barred the government from going forward with the new prosecution. *Id.* at 446.

To reach that conclusion, *Ashe* undertook a careful review of the record in the first trial. *See id.* at 438-39. The review considered the evidence introduced, the arguments of counsel, and the jury instructions. *See id.* The Court concluded from that review that, in

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[4] Bravo contends that *Ashe*'s instruction for us to "examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter," 397 U.S. at 444, applies only to acquittals based on a general verdict. And Bravo points out that the defendants' trial involved a special verdict form. But while we agree with Bravo that the "special verdicts themselves must be considered" in undertaking the *Ashe* inquiry, in this case, as we will explain, the special verdict form alone does not provide enough information to resolve the defendants' arguments. We therefore, for reasons provided below, must consider the materials that *Ashe* identifies along with the special verdict form to determine whether the acquittals the jury recorded in the special verdict form necessarily decided an issue adversely to the government that the government would have to relitigate in the renewed prosecutions on the standalone § 666 counts.

acquitting, the jury had necessarily decided that the defendant was not present at the home where the victims had been robbed. *Id.* at 445. The Court then concluded that the jury's resolution of that issue adversely to the government was as determinative of the government's ability to prove its case in the second prosecution as in the first. *See id.* at 445-46. And so the Court held that the second prosecution could not go forward even though the named victim was different. *Id.*

There is, however, an important limitation on the application of the rule of collateral estoppel that, *Ashe* held, the Double Jeopardy Clause incorporates. And this limitation is of potential relevance to the collateral estoppel effect that we should accord to the acquittals on which the defendants rely here, in light of the convictions on the standalone § 666 counts that this same jury also rendered.

This limitation is set forth in the Supreme Court's decision in *United States v. Powell*, 469 U.S. 57 (1984). There, the Supreme Court explained that where "the same jury reached inconsistent results . . . [,] principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful." *Id.* at 68. Relying on its prior holding to the same effect in *Dunn v. United States*, 284 U.S. 390 (1932), *Powell* gave the following reason for this rule: "[W]here truly inconsistent verdicts have been reached, '[t]he most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt.'" *Powell*, 469 U.S. at 64-65 (quoting *Dunn*, 284 U.S. at 393).

Powell acknowledged that it is, of course, possible that an acquittal that is inconsistent with a conviction still reflects a jury's finding of reasonable doubt as to guilt. *Id.* But *Powell* explained that "[i]t is equally possible that the jury, convinced of guilt, properly reached its conclusion on the [convicted] offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the [acquitted] offense." *Id.* at 65.

Powell for that reason rejected the argument that, under *Ashe*, an acquittal could, via collateral estoppel, invalidate a truly inconsistent conviction that was rendered by the same jury in the same proceeding. *Id.* at 64. In such a case, *Powell* concluded, there is no way to know without speculating which of the inconsistent verdicts—the acquittal or the conviction—"the jury 'really meant.'" *Id.* at 68. The government, of course, cannot challenge the acquittals on that basis—the acquittals must stand. *See id.* But the inconsistency makes the jury's findings indecipherable. *See id.* at 65-68. And so "principles of collateral estoppel"—which require a determination of what the jury necessarily decided—are impossible to apply. *Id.* at 68.

Thus, in light of *Powell*, the defendants do not deny that a true inconsistency in what the jury has done in acquitting on one offense while convicting on another can make unanswerable *Ashe*'s question about what the jury necessarily decided in rendering the acquittal. And so long as that question cannot be answered, the acquittal cannot be given collateral estoppel effect such that it would bar a prosecution for a related offense.

Against this legal background, the defendants admit they need to show two things in order for their collateral estoppel argument to succeed and bar the renewed prosecutions on the standalone § 666 counts. The defendants need to show that the acquittals on the Travel Act

and conspiracy counts involving § 666 would, considered on their own, collaterally estop the renewed, standalone § 666 prosecutions. The defendants further need to show that, under *Powell*, the now-vacated convictions on those standalone § 666 counts do not strip the § 666-based Travel Act and conspiracy acquittals of the collateral estoppel effect that they otherwise might have. Although the defendants need to make both showings in order to prevail, the arguments the defendants make with respect to each showing are not unrelated to one another. In particular, understanding the defendants' arguments about what the acquittals show on their own helps to set the stage for many of the defendants' arguments about why those acquittals have collateral estoppel effect notwithstanding the convictions that the jury also rendered. We therefore consider each part of the defendants' collateral estoppel argument in turn.

III.

We begin by setting to one side the convictions on the standalone § 666 counts and examining whether the acquittals on the conspiracy and Travel Act counts involving § 666 would, considered on their own, support the defendants' collateral estoppel argument. To make that argument, the defendants seek to demonstrate that the jury, in acquitting on the conspiracy and Travel Act counts involving § 666, necessarily decided that the government had failed to prove that the defendants violated § 666. And the defendants further contend that the jury's finding as to the failure of proof concerned, in particular, the exchange theory of § 666 liability on which the renewed prosecutions must depend. *See Fernandez*, 722 F.3d at 19-20, 28.

We start with the defendants' contention that the acquittals show that the jury found a failure of proof as to § 666. One obstacle the defendants face in making that showing arises from the nature of the two offenses on which the jury acquitted. As to each, § 666 was implicated only as a predicate offense. And so there is a question whether the jury's acquittals concerned the predicate offense at all.

In the abstract, as the government points out, an acquittal for conspiracy does not necessarily show that the jury found that the government failed to prove that the defendant committed the predicate offense. *See, e.g., United States v. Marino*, 277 F.3d 11, 39 (1st Cir. 2002). Conspiracy requires proof of elements independent of the predicate offense, including the element that there be an agreement between "two or more persons." *See* 18 U.S.C. § 371. It is thus possible that a jury's acquittal on conspiracy reflects only that jury's finding that the government failed to prove one of those independent elements—such as the element of agreement—rather than that the government failed to prove a violation of the predicate offense.

Similarly, the Travel Act requires proof of elements, including interstate travel, that are independent of the predicate offense. *See* 18 U.S.C. § 1952. And thus, in theory, as the government also notes, an acquittal on that offense might rest only on a jury's finding that the government failed to prove one of the independent elements and not on a finding that the government had failed to prove the predicate offense itself. *See, e.g., United States v. Stafford*, 831 F.2d 1479, 1482 (9th Cir. 1987).

But the defendants argue—and the government does not contend otherwise—that the independent elements of the conspiracy and Travel Act offenses are

not material to the collateral estoppel analysis here. In support of that argument, the defendants point to the nature of the charged conduct for the predicate § 666 offense for the conspiracy and Travel Act counts.

That conduct included a trip the defendants took from Puerto Rico to Nevada to see a boxing match, in connection with support for pending legislation. The defendants thus argue that the charged conduct involved both travel and agreement. On that basis, the defendants contend—and, again, the government does not argue to the contrary—that the independent elements of travel and agreement for the conspiracy and Travel Act counts involving § 666 necessarily overlapped with elements of § 666 itself. Thus, the defendants argue, when the jury acquitted on those counts, the jury necessarily rejected liability under § 666 itself, even though § 666 was only a predicate offense for the conspiracy and Travel Act counts.

We next consider the defendants' contention that the acquittals show that the jury rejected the exchange theory of § 666 liability in particular. Here, too, the defendants contend that there is no problem. The defendants point out that the acquittals show that the jury rejected every theory of § 666 liability that the jury was given, including the exchange theory. In this way, the defendants contend that the "record of the prior proceeding," *Ashe*, 397 U.S. at 444 (quoting Mayers & Yarbrough, *supra*), shows that the acquittals on the conspiracy and Travel Act counts for which § 666 was the predicate offense do have collateral estoppel effect on the renewed, standalone § 666 prosecutions.

But even if we were to accept each step in the defendants' argument to this point, the defendants still would need to show one more thing.[5] The defendants would still need to show that the conspiracy and Travel Act acquittals do not lose the collateral estoppel effect that they otherwise might have in consequence of the convictions that the jury also rendered on the standalone § 666 counts. Accordingly, we now take up that issue.

IV.

The defendants offer two reasons for concluding that the vacated convictions on the standalone § 666 convictions do not, under *Powell*'s limitation on the rule of collateral estoppel, strip the acquittals on the conspiracy and Travel Act counts involving § 666 of collateral estoppel effect. Neither reason the defendants offer, however, is persuasive.

A.

The defendants' first reason is that the convictions on the standalone § 666 counts have been vacated and are no longer final. *See Fernandez*, 722 F.3d at 27 The defendants thus argue that the acquittals alone should be considered in determining what the jury necessarily decided under *Ashe*. And, the defendants further contend, because the acquittals, considered on their own, show that the jury did reject § 666 liability, the Double

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[5] The government does not argue that the acquittals the defendants rely on rested on a rejection of the extra elements involved in those offenses. But neither does the government expressly concede that the acquittals did reject § 666 liability. Instead, the government argues that the acquittals are "at most inconsistent" with the convictions on the issue of § 666 liability. As we find such an inconsistency, we need not decide whether the acquittals did reject § 666 liability, or whether they instead rested only on a rejection of some extra element.

Jeopardy Clause bars the renewed prosecutions on the standalone § 666 counts.

We do not agree, however, that we may not consider the vacated convictions as part of our collateral estoppel inquiry, under *Ashe*, into what the jury necessarily decided. Our reasoning on this point follows in large part from *Ashe* itself.

There, the Court instructed that, for purposes of determining the collateral estoppel effect of acquittals, we must undertake a "practical" analysis based on the "record" of the prior proceeding, and with "'an eye to all the circumstances of the proceedings.'" *Ashe*, 397 U.S. at 444 (quoting *Sealfon*, 332 U.S. at 579). Like the acquittals on which the defendants rely, the convictions in this case are part of what the jury decided at trial. For that reason, *Ashe*'s expansive instruction to consider what happened in the prior proceeding points strongly in favor of taking account of not only the acquittals but also the convictions, even though they have been vacated.

The fact that a vacated conviction has been "nullified," *Bullington v. Missouri*, 451 U.S. 430, 442 (1981), moreover, does not require a different conclusion. "When a court vacates a conviction, it sets aside or nullifies the conviction and its attendant legal disabilities; the court does not necessarily attempt to erase the fact of the conviction." *United States v. Crowell*, 374 F.3d 790, 792 (9th Cir. 2004). And it is the "fact of the conviction," and not its "attendant legal disabilities," *id.*, that is relevant to the *Ashe* analysis of what the jury's verdicts show that the jury necessarily decided.

In addition, the convictions at issue here were vacated only for trial error. *See Fernandez*, 722 F.3d at 26-27. But a "reversal for trial error . . . does not constitute a decision to the effect that the government has failed to prove its case." *Burks v. United States*, 437 U.S. 1, 15 (1978). Thus, for purposes of deciding whether the jury necessarily decided that the government failed to prove that the defendants violated § 666, the fact the jury also convicted the defendants of violating § 666 would seem to be of quite obvious relevance, even though the convictions were later vacated.

We also do not agree with the defendants that, in conducting the *Ashe* analysis, we should disregard vacated convictions because they are not meaningfully different from hung counts, which are counts on which the jury reached no verdict at all. The defendants rely for their contention on the Supreme Court's decision in *Yeager v. United States*, 557 U.S. 110.

In *Yeager*, the Court held that hung counts are, for purposes of performing *Ashe*'s collateral estoppel inquiry into what a jury necessarily decided, "not a 'relevant' part of the 'record of [the] prior proceeding.'" *Id.* at 121 (quoting *Ashe*, 397 U.S. at 444). In reaching that conclusion, *Yeager* explained that *Powell* relied on the need to respect the finality of an otherwise valid verdict in refusing to overturn a conviction that seemingly conflicted with an acquittal. *Yeager*, 557 U.S. at 124. *Yeager* reasoned in this regard that the same concern about respecting final verdicts applied equally to respecting the finality of an acquittal. *See id.* *Yeager* thus declined to allow a hung count—which was not a final verdict—to create a conflict with an acquittal—which was. *Id.*

But we do not believe *Yeager* supports treating vacated convictions like hung counts under *Ashe*. For while a vacated conviction, like a hung count, is not a final jury verdict, *Yeager* did not rely solely on a respect-for-finality rationale to explain why hung counts should not be considered for *Ashe* purposes. Nor did *Yeager* hold that a verdict that lacked finality could never bear on an acquittal's collateral estoppel effect. Instead, in refusing to conclude that a hung count could create a "truly inconsistent" verdict, *Yeager* also explained that "a jury speaks only through its verdict," and that there was "no way to decipher what a hung count represents" as a hung count represents not "a jury's decision[]" but only "its failure[] to decide." *Id.* at 121-122.

This line of reasoning in *Yeager* suggests that, under *Ashe*, vacated counts should be treated differently from hung counts. After all, vacated convictions, unlike hung counts, *are* jury decisions, through which the jury *has* spoken. In other words, vacated convictions are still part of what the jury did decide at trial. For that reason, vacated convictions on some counts do potentially bear on the question whether the jury, in acquitting on other counts, necessarily decided an issue in a manner contrary to what the government would have to prove in renewed prosecutions. *See Yeager*, 557 U.S. at 115. And that is because *Powell*'s "prudent acknowledgment" that inconsistent verdicts make it impossible to determine what a jury necessarily decided, 469 U.S. at 65, 68, is not undermined by the mere fact that a potentially conflicting conviction has been vacated. Rather, a vacated conviction may still suggest that an acquittal with which that conviction conflicts was the result of "mistake, compromise, or lenity." *Id.* at 65. And so unless the inconsistency can be resolved, "principles of collateral estoppel . . . are no longer useful." *Id.* at 68.

We thus conclude that vacated convictions, unlike hung counts, are relevant to the *Ashe* inquiry into what a jury necessarily decided when acquitting on counts related to the vacated convictions.[6] In doing so, we join the only other circuits to have decided the issue, *see United States v. Citron*, 853 F.2d 1055, 1059 (2d Cir. 1988); *United States v. Price*, 750 F.2d 363, 366 (5th Cir. 1985),[7] as well as the highest courts of New Jersey and the District of Columbia, *see State v. Kelly*, 992 A.2d 776, 789 (N.J. 2010); *Evans v. United States*, 987 A.2d 1138, 1141-42 (D.C. 2010). And although a divided Michigan Supreme Court recently came to the opposite judgment, we find the dissenting opinion in that case more persuasive on this point. *See People v. Wilson*,

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[6] To be clear, although we conclude that the vacated convictions might prevent the acquittals from collaterally estopping the renewed prosecutions, the acquittals themselves remain inviolate. They forever bar the United States from prosecuting the defendants for conspiracy and Travel Act offenses based on the charged conduct and § 666 as a predicate offense. Likewise, our taking account of the vacated convictions does not undermine the defendants' victory in getting those convictions set aside. The defendants still get the benefit of their appellate victory in *Fernandez*, as the convictions have been vacated, and the government in a second prosecution cannot present the impermissible gratuity theory.

[7] Although *Citron* and *Price* predate *Yeager*, both the Second and Fifth Circuits decided that vacated counts are relevant to the *Ashe* analysis at a time when those circuits had already ruled that hung counts should be disregarded for purposes of the *Ashe* inquiry. *See United States v. Mespoulede*, 597 F.2d 329, 332, 335-36 (2d Cir. 1979); *United States v. Nelson*, 599 F.2d 714, 716-17 (5th Cir. 1979). And the Second Circuit has continued to follow *Citron* after *Yeager*. *See United States v. Bruno*, 531 F. App'x 47, 49 (2d Cir. 2013) (unpublished).

852 N.W.2d 134 (2014); *see also id.* at 142 (Markman, J., dissenting).[8]

Thus, in undertaking our *Ashe* inquiry into the collateral estoppel effect that must be given to the acquittals on the conspiracy and Travel Act counts involving § 666, we must consider the now vacated, standalone § 666 convictions. Contrary to the defendants' contention, the fact that those convictions were overturned for trial error provides no basis for excluding them from the record that *Ashe* requires us to consider.

B.

The defendants do have a fallback position. They argue that, even if the convictions must be considered as part of the *Ashe* inquiry, the convictions do not deprive the acquittals of collateral estoppel effect. That is because, the defendants contend, the trial record shows that the convictions on the standalone § 666 counts are actually consistent with the acquittals on those counts for which § 666 was a predicate offense. And, further, the defendants contend that the verdicts

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[8] Martínez does cite an unreported decision of the Appellate Division of the Superior Court of New Jersey in which that court referred to its "inclination to regard the counts on which [it] had reversed the defendant's conviction as a nullity, analogous to a situation where there is a hung jury on certain counts." *State v. Hermalyn*, No. 06-11-2085, 2012 WL 3000334, at *1 (N.J. Super. Ct. App. Div. July 24, 2012) (per curium) (citing *Yeager*, 557 U.S. at 120). *Hermalyn* provides no explanation for that "inclination," and it appears directly inconsistent with the New Jersey Supreme Court's opinion in *Kelly*, which *Hermalyn* did not cite. *See Kelly*, 992 A.2d at 789. In *Kelly*, which like this case (and like *Hermalyn*) involved the retrial of vacated convictions, the New Jersey Supreme Court held that "*Yeager* has no application to a case involving an inconsistent verdict of acquittals and convictions returned by the same jury," as opposed to hung counts. *Id.* at 778, 789.

on those counts—though involving both convictions and acquittals—are consistent in a way that shows that the acquittals did reject the exchange theory of § 666 liability and thus should be given collateral estoppel effect to bar the renewed standalone § 666 prosecutions. Thus, the defendants argue, the convictions do not create "truly inconsistent" verdicts with respect to § 666 that would implicate *Powell*'s limitation on the collateral estoppel rule. 469 U.S. at 64.

To show how the convictions and acquittals may be reconciled in this way, Martínez explains that "[a] 'rational' jury could conclude a defendant had not committed bribery [under an exchange theory] . . . while at the same time convicting the same defendant under a gratuity theory under Section 666." And so, Martínez argues, "concluding that the jury found a gratuity and not bribery [in convicting on the standalone § 666 counts] is the logical way to reconcile the verdict." Or, as Bravo puts the point in his brief, the "only logical conclusion is that the jury rested its §[ ]666 convictions on a finding of gratuities, not §[ ]666 bribery [under the proper exchange theory], and that its verdicts on the conspiracy and Travel Act counts necessarily rejected a §[ ]666 bribery theory [under the proper exchange theory]."

In making this argument, the defendants rely solely on a claim about how the jury was instructed.[9] In particular, the defendants contend that the District Court

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[9] The defendants offer no other argument for how the jury rationally could have acquitted on the conspiracy and Travel Act counts that involved § 666 in a way that rejected only the exchange theory of § 666 liability and not the gratuity theory as well. Perhaps the defendants could have argued that a gratuity, unlike a quid pro quo exchange, involves no agreement. If a gratuity need not involve an agreement, then it could be argued that

presented the improper gratuity theory to the jury only as to the standalone § 666 counts. The defendants thus contend that—consistent with the jury instructions—the jury could have convicted on the standalone § 666 counts on the gratuity theory without having to consider (and thus reject) that same theory in acquitting on the conspiracy and Travel Act counts that involved § 666. In this way, the defendants argue, the verdicts concerning § 666—whether as a standalone or predicate offense—may be harmonized. The acquittals rejected one theory of § 666 liability (the proper one) and the convictions accepted another theory of § 666 liability (the improper one).

The Supreme Court in *Powell*—in holding that an acquittal lacks collateral estoppel effect when truly inconsistent with an accompanying conviction—did

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the § 666-based conspiracy acquittals rejected only the exchange theory of § 666 liability. A gratuity theory of § 666 liability, by not requiring that there be an agreement, would arguably not have required the jury to find conspiracy liability. But the defendants do not make such an argument for reconciling the verdicts, and so we do not address whether there is any force to the argument.

The reason the defendants do not make that additional argument, moreover, is readily apparent. The argument does not help with respect to the separate, § 666-based Travel Act acquittals. In this case, the allegedly unlawful payment took the form of an all-expenses paid interstate trip. Whether that trip was given as a gratuity or as a quid pro quo exchange, it would still involve interstate travel. And thus, if the jury concluded the trip violated § 666 then the jury should also have found a § 666-based Travel Act violation. *See* 18 U.S.C. § 1952(a)(3) (prohibiting interstate travel to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity"). Yet the jury did not do so. Thus, if the defendants' differential jury instructions argument does not hold up, then they are left with verdicts on § 666 that are unavoidably inconsistent with each other.

not directly confront an argument like this one. The defendant in *Powell* was arguing that the verdicts were inconsistent in order to compel the reversal of a conviction in consequence of a supposedly contradictory acquittal. 469 U.S. at 60. And the government, in defending the conviction against such challenge, did "not dispute the inconsistency." *Id.* at 69. The Supreme Court thus did not need to address in *Powell* how courts should determine whether verdicts are inconsistent when a defendant seeking to benefit from the collateral estoppel effect of an acquittal denies that the acquittal really is in conflict with a conviction that the jury also rendered. *See id.* Nor has the Supreme Court had occasion to address that issue in any subsequent case.

Because *Ashe* governs the defendants' underlying collateral estoppel argument, however, we believe that *Ashe*'s instruction to consider the record in the prior proceeding in determining what the jury necessarily decided is fully applicable to this aspect of the collateral estoppel inquiry. Moreover, we agree with the defendants that jury instructions are relevant to the review of the record that *Ashe* requires. *See* 397 U.S. at 444 (explaining that the inquiry should consider the "charge" to the jury); *United States v. Brown*, 983 F.2d 201, 202 (11th Cir. 1993) (listing "jury instructions" as among the "relevant matters" to be considered in the *Ashe* inquiry); *see also United States v. Olano*, 507 U.S. 725, 740 (1993) (describing "the almost invariable assumption of the law that jurors follow their instructions" (quoting *Richardson v. Marsh*, 481 U.S. 200, 206 (1987))). Relevant as well to the *Ashe* inquiry are the parties' "closing arguments." *Brown*, 983 F.2d at 202.

And so, to evaluate the defendants' fallback argument, we review the trial record—and, in particular, the jury instructions and the arguments that the parties made to the jury about the meaning of § 666—to determine whether the verdicts involving § 666 may be reconciled in the way the defendants propose. If it turns out from that review that the verdicts may be reconciled by reference to the jury instructions and the arguments of counsel, then the "assumption that the jury acted rationally and found certain facts in reaching its verdict" will be restored, and collateral estoppel principles will again be useful. *See Powell*, 469 U.S. at 68; *Wilson*, 852 N.W.2d at 151-52 n.12 (Markman, J., dissenting).

In taking up this inquiry, we are mindful that the defendants bear the burden of showing that the jury necessarily decided an issue adversely to the government that the government needs to prove in order to convict on a related offense in a new trial. *See Schiro v. Farley*, 510 U.S. 222, 232 (1994). But we are also mindful that, if "any reasonable assessment of the verdict" would lead to a reconciliation of the apparent inconsistency between the convictions and the acquittals involving § 666, we might be required to adopt that account. *Fernandez*, 722 F.3d at 34. As we put it in *Fernandez*, "[w]e will not bend over backwards to formulate some route" to allow the government to reprosecute. *Id.*

As we will explain, however, the record in this case shows that the jury was offered the same theories of § 666 liability as to every count involving § 666, whether as a predicate offense or a standalone crime. We therefore conclude that on this record no reasonable assessment of the verdicts is available that reconciles the verdicts in the way the defendants propose. And in

consequence of the inconsistency in those verdicts, we conclude that, consistent with the Supreme Court's decision in *Powell*, the defendants cannot meet their burden of showing that the acquittals involving § 666 collaterally estop the renewed, standalone § 666 prosecutions.

1.

Consider the first pair of instructions that the jury received regarding § 666. These were the ones that we held were erroneous in *Fernandez*. 722 F.3d at 26-27 The District Court began each erroneous instruction by explaining that "to find [each defendant] guilty of *bribery*, you must be convinced that the Government has proven each of the following things beyond a reasonable doubt . . . ." (emphasis added). The instructions then went on to define "bribery" in a way that included both the proper exchange theory and the improper gratuity theory. *See id.*

Significantly, nothing in these instructions tied or restricted that definition of "bribery"—improper though it was—to the standalone § 666 counts in particular. And thus nothing about these instructions suggests that the jury was offered the gratuity theory only as to the standalone counts on which the jury convicted, and not as to the other counts involving § 666, for which § 666 was a predicate offense and on which the jury acquitted.

The written version of these instructions, moreover, was given to the jury under the heading "Bribery Concerning Programs Receiving Federal Funds, 18 U.S.C. § 666(a)(2)." That heading also tied the definition of bribery to § 666 as an offense without tying that definition to the standalone § 666 counts specifically. And thus, on its face, the heading did not exclude the

improper gratuity theory from applying to the other counts involving § 666 as a predicate crime—namely, the counts that resulted in the acquittals.

An examination of the jury instructions with respect to the Travel Act counts reinforces the point. The District Court instructed the jury that the government had to prove "[f]irst, that the Defendants travelled [sic] in interstate commerce; [and] [s]econd, that they did so with the intent to promote, manage, establish, carry on, or facilitate . . an 'unlawful activity,' here, a violation of Federal or Puerto Rico law regarding criminal bribery." The District Court then explained that "[t]he elements of bribery in violation of the bribery laws of the United States—specifically, Title 18, United States Code, Section 666(a)(1)(B) and 666(a)(2)—are discussed elsewhere in these instructions." In other words, the instructions on the Travel Act counts explicitly incorporated by reference the later, erroneous instructions on what was needed to convict the defendants of "bribery" under § 666. Thus, contrary to the defendants' contention, the jury had no basis for applying a different "bribery" definition in the Travel Act counts for which § 666 was a predicate offense—and on which the jury acquitted—from the "bribery" definition that the jury applied in the standalone § 666 counts—on which the jury convicted.

The jury instructions on the conspiracy counts are no different in this regard. The jury was told:

> For you to find Defendants Bravo and Martinez guilty of conspiracy, you must be convinced that the Government has proven each of the following beyond a reasonable doubt: First, that the agreement specified in the Indictment, and not some other agreement or agreements, existed between at least two people to: Commit

> bribery concerning federal funds, pursuant to Title 18, United States Code, Section 666, or; Travel in interstate commerce in aid of racketeering, pursuant to Title 18, United States Code, Section 1952 . . . .

The District Court then provided instructions on the requirements for finding an agreement, but said nothing at all at that time about what "bribery concerning federal funds, pursuant to Title 18, United States Code, Section 666" meant. And so with respect to the conspiracy counts involving § 666, the jury was not given any cause to apply a different definition of "bribery" in the conspiracy counts from that which the jury had been instructed to apply to the standalone § 666 counts.

Nor did the parties' closing arguments suggest that different theories of § 666 liability applied. In its closing argument, the government did use, in connection with the standalone § 666 counts, the "intent to influence or reward" language that we held in *Fernandez* had allowed the jury to consider the impermissible "gratuity" theory. *See* 722 F.3d at 18. But the government, like the jury instructions, used that language in defining what "bribery that involves federal funds" meant. The government thus said nothing to suggest that the gratuity theory was inapplicable to the Travel Act and conspiracy counts involving § 666.

In fact, when the government turned in its closing argument to the Travel Act counts, the government said only as to the meaning of bribery that the defendants must have traveled "with the intent to commit a crime. And here, the crime's bribery." Further, when the government turned to the conspiracy counts, the government argued expressly that "the agreement has to be to commit one of the two crimes *we've already talked about*: Federal program bribery or interstate

travel in aid of racketeering" (emphasis added). The government's closing argument, therefore, did not suggest that the definition of bribery discussed with respect to the standalone § 666 counts applied exclusively to those counts.

Finally, Martínez's counsel in his closing argument underscored the equivalence between "bribery" as used in the standalone § 666 counts and as used in the conspiracy and Travel Act counts involving § 666. Martínez's counsel argued that the jury should apply only the exchange theory of bribery. But he made that argument with respect to "Counts 1, 2, 3, and 4, and 5"—in other words, with respect to *all* of the counts (conspiracy, Travel Act, *and* standalone) involving § 666. Nothing Martínez's counsel said, therefore, suggested any difference between the definition of "bribery" the jury was to use as to any of these counts, even though the jury convicted on some and acquitted on others.[10]

We therefore conclude that the District Court instructed the jury to consider the gratuity theory of § 666 liability not only on the standalone § 666 counts, but also on the Travel Act and conspiracy counts for which § 666 was a predicate offense. And further, we conclude that the closing arguments by counsel accord with this same understanding of how the jury was to be instructed.

2.

The defendants do seize on one bit of language from *Fernandez* in support of their contention that the jury received different instructions as to some of the counts involving § 666. In *Fernandez*, we did observe that the jury received a correct bribery instruction, which allowed

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[10] Bravo's counsel also gave a closing argument, but his argument did not address the definition of bribery.

only the exchange theory, alongside the improper one that allowed both the exchange and the gratuity theories. *Id.* at 20. In doing so, we explained that this proper instruction "applied to both the Puerto Rico and federal bribery counts," whereas the erroneous instructions setting forth the gratuity theory were "instructions on the § 666 counts themselves." *Id.*

The defendants argue that this quoted language—by referring to the "§ 666 counts"—shows that we held in *Fernandez* that the jury received the improper gratuity instruction only for the standalone § 666 counts, and not for those counts involving § 666 that resulted in acquittals, each of which involved § 666 only as a predicate offense. In this way, the defendants contend that *Fernandez* supports their argument that the jury's apparently inconsistent verdicts can be reconciled by reference to the instructions the jury received.

But the defendants overread the quoted language. *Fernandez* did not decide whether "the § 666 counts" to which we said the erroneous instructions applied included *only* the standalone § 666 counts. *See id.* In context, it seems clear that by "the § 666 counts" we meant to distinguish those counts that involved § 666 from those counts that involved Puerto Rico bribery law. *See id.* We were not drawing a distinction among the "§ 666 counts," counts that in fact included the Travel Act and conspiracy counts for which § 666 was a predicate offense.

Indeed, we had no occasion in *Fernandez* to consider whether the erroneous instructions on the meaning of § 666 also applied to the Travel Act and conspiracy counts for which § 666 was a predicate offense. The acquittals on those counts were, obviously, not under review in that appeal. *See id.* at 8.

Moreover, it is not surprising that the erroneous instructions offering up the gratuity theory applied to all the counts involving § 666, and not just to the standalone § 666 counts. As we explained in *Fernandez*, courts have divided with respect to whether § 666 does or does not criminalize gratuities. *See id.* at 23-27. And while we held in *Fernandez* that § 666 does not criminalize gratuities, *id.* at 27, the District Court, in giving the erroneous instructions over the defendants' objections, evidently had determined that § 666 did criminalize gratuities. No party argued to the District Court, however, that § 666 criminalizes gratuities when the defendant is prosecuted for § 666 violations themselves, but not when § 666 serves as a predicate offense for conspiracy or Travel Act violations. Nor do the defendants advance any such argument on appeal.

For that reason, it makes perfect sense that the District Court's instructions on what § 666 prohibited were given as to all counts involving that offense, both when § 666 served as a predicate offense and when it stood alone. And, as we have just explained, the record shows that the instructions setting forth the erroneous gratuity theory of § 666 liability applied broadly to all counts involving § 666. As discussed, explicit and implicit cross-references in the jury instructions show that the erroneous instructions on § 666 were given as to all the counts that involved § 666 as a predicate offense, including the counts involving § 666 on which the jury rendered acquittals.

3.

This fact about the counts to which the jury instructions—and the arguments of counsel—applied is incompatible with the defendants' account of what the jury did. If, as the defendants contend, the jury based the now-vacated, standalone § 666 convictions

solely on a gratuity theory, then the jury should have considered that same gratuity theory and found the defendants guilty when the jury issued its verdicts on at least the Travel Act charges for which § 666 was a predicate offense.[11] After all, the instruction allowing the gratuity theory applied, by its terms, to all § 666-related counts. And yet the jury found the defendants not guilty on those § 666-based Travel Act charges. The verdicts are thus inconsistent with respect to § 666 liability, even assuming, as the defendants contend, that the convictions on the standalone § 666 counts relied only on the jury's acceptance of the gratuity theory.

If, on the other hand, the jury interpreted the instructions' conflicting definitions of "bribery" to allow for only an exchange theory of § 666 liability, then the verdicts would still be irreconcilable. And that is again because the same instructions on the meaning of bribery in § 666 were given as to all counts involving § 666. The convictions on the standalone counts would thus show that the jury found the defendants guilty

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[11] In referring to the § 666-based Travel Act charges, we do not include the conspiracy to violate the Travel Act charges. We set those conspiracy charges, as well as the charges for conspiracy to violate § 666, to one side even though, as noted above, *supra* note 9, the defendants make no argument distinguishing the conspiracy charges from the Travel Act charges in attempting to reconcile the verdicts. We limit our focus in this way because, even if the § 666-based conspiracy acquittals could be squared with the standalone § 666 convictions on the ground that a gratuity-theory § 666 violation need not have involved an agreement, *see id.*, the § 666-based Travel Act acquittals not involving conspiracy are not subject to any such squaring. The result is that the § 666-based Travel Act acquittals suffice on their own to create truly inconsistent verdicts concerning § 666 liability, and thus to prevent the defendants from meeting their burden under *Ashe* to show what the jury necessarily decided.

under the proper, exchange theory of § 666. In contrast, the acquittals on the Travel Act counts based on the § 666 predicate offense would show that the jury found the defendants not guilty under that same exchange theory of § 666. Once again, the acquittals would be inconsistent with the convictions with respect to the defendants' liability under § 666.

For that reason, the argument that we must read the verdicts consistently if possible does not, on this record, help the defendants meet their burden under *Ashe*. And that is because no consistent reading of the verdicts is available—given this record—that would support, under *Ashe*'s practical inquiry, the defendants' favored conclusion: namely, that the jury acquitted the defendants on the exchange theory of § 666 and convicted the defendants only on the gratuity theory.

Of course, it is possible that the jury did actually find the defendants guilty on the standalone § 666 counts only on the basis of a gratuity theory and not on the basis of an exchange theory. And it is also possible that the jury considered (and rejected) only the exchange theory in acquitting on the Travel Act counts involving § 666. But it was equally possible in *Powell* that the jury "really meant" to acquit rather than to convict, when the jury did both, and yet that mere possibility did not lead the Court to give the acquittal collateral estoppel effect. *Powell*, 469 U.S. at 68.

So, too, here. Nothing about the instructions or the record in the prior proceeding suggests that the jury did what the defendants necessarily contend that the jury did—depart from the District Court's instructions and rely on different theories of § 666 liability in assessing the different counts involving that offense. We could therefore come to such a conclusion only by engaging in the sort of "pure speculation" or "inquiries

into the jury's deliberations" that *Powell* forbids. *Id.* at 66. And such a speculative exercise could hardly suffice to satisfy the defendants' burden under *Ashe* of showing that "the issue whose relitigation [they] seek[] to foreclose was actually decided" in the prior proceeding. *Schiro*, 510 U.S. at 233.

C.

The defendants do make one final argument on behalf of their attempted reconciliation of the acquittals and the convictions that involve § 666. The defendants point to this Court's handling of a separate collateral estoppel issue in *Fernandez*. *See* 722 F.3d at 29-33. The defendants argue that this aspect of our decision in *Fernandez* supports the conclusion that the jury's acquittals of the defendants on the counts for which § 666 is a predicate offense were consistent with the jury having convicted the defendants on the standalone § 666 counts. *See id.*

But our analysis in *Fernandez* does not compel a finding of collateral estoppel here. In fact, if anything, our analysis of the collateral estoppel issue in *Fernandez* shows why, in light of this record, a finding of collateral estoppel here would be unwarranted given *Powell*'s rule against speculating about what a jury did in the case of truly inconsistent verdicts.

The collateral estoppel issue arose in *Fernandez* in the following way. The jury had convicted Bravo of conspiring to violate the Travel Act in furtherance of unspecified "racketeering" activity. 722 F.3d at 34. We had vacated that conviction. *Id.* We did so because of the possibility that the "racketeering" activity the jury found had concerned violations of the Puerto Rico bribery law—a law that had been repealed before the relevant

actions the defendants had undertaken—rather than violations of § 666. *Id.*

Bravo then sought to foreclose his future prosecution for conspiracy to violate the Travel Act in furtherance of § 666 violations specifically. *See id.* at 33. We interpreted Bravo's argument against such a future prosecution as being based on the collateral estoppel rule contained in *Ashe*. *Id.* at 33 & n.25. Specifically, Bravo contended that his acquittals on the same offenses on which the defendants now rely—conspiracy to violate § 666 and a Travel Act violation based on § 666—barred his future prosecution for conspiracy to violate the Travel Act in furtherance of a § 666 violation. *See id.* at 33-34.

To resolve Bravo's collateral estoppel argument, we decided we needed to determine what "racketeering" activity the jury had decided Bravo engaged in when the jury convicted him of conspiracy to violate the Travel Act. *Id.* at 34. And the two possibilities we identified were a § 666 violation and a violation of Puerto Rico bribery law. *Id.* at 29. Only if the unspecified "racketeering" activity underlying the conviction had been based on a violation of Puerto Rico bribery law rather than of § 666 could Bravo succeed in pressing his collateral estoppel argument against being retried for conspiring to violate the Travel Act in furtherance of a § 666 violation. *See id.* at 34.

Our inquiry into which of those offenses was the "racketeering" activity on which the vacated conspiracy conviction rested turned out to be an easy one. The jury had acquitted Bravo on the charge that he had conspired to violate § 666 and on the charge that he had violated the Travel Act in furtherance of a § 666 violation. *Id.* In contrast, the jury had convicted Bravo

on the charge of violating the Travel Act in furtherance of a violation of Puerto Rico bribery law. *Id.*

Taking a "practical, realistic view" of the verdicts, we concluded from these other verdicts that Bravo's (facially ambiguous) conspiracy to violate the Travel Act conviction had been based on Puerto Rico bribery law violations, and not § 666. Only that conclusion, we explained, harmonized the verdicts without creating any inconsistency among them. *Id.* at 34. And, in consequence of that conclusion about what the jury had done, we concluded that the conspiracy to violate the Travel Act conviction—at least if we assumed the jury had acted rationally—did not contradict the acquittal on the Travel Act and conspiracy charges that had § 666 as a predicate offense. *Id.* We then held that the latter acquittals did collaterally estop Bravo's renewed prosecution for conspiring to violate the Travel Act in furtherance of violating § 666. *Id.*

Fernandez does show that the defendants' approach of using acquittals on separate counts to clarify the basis for an ambiguous conviction has potential force. But the parties in *Fernandez* did not raise, and so *Fernandez* did not address, the question that is the crucial one in this appeal: whether the conspiracy and Travel Act acquittals based on § 666 may be given any collateral estoppel effect at all given their inconsistency with the standalone § 666 convictions.

The government made no such argument in *Fernandez*. Rather, the government's sole *Powell*-based argument in *Fernandez* was the contention that *Powell* showed that Bravo's conviction for conspiracy to violate the Travel Act was still valid even if that conviction was inconsistent with other verdicts. And so, in concluding that the § 666-based conspiracy and Travel

Act acquittals precluded a future prosecution for conspiracy to violate the Travel Act, our analysis did not address the standalone § 666 convictions, or their relevance to the collateral estoppel effect that the § 666-based Travel Act and conspiracy acquittals should be given.

In this case, by contrast, the government squarely raises the argument that, under *Powell*, the convictions on the standalone § 666 counts are inconsistent with the acquittals on the § 666-based conspiracy and Travel Act charges, and thus deprive those acquittals of the collateral estoppel effect that the defendants ask us to give them. And so we have been obliged to consider the effect of the standalone § 666 convictions. As we have explained, however, those convictions, unlike the conviction for conspiracy to violate the Travel Act based on unspecified "racketeering" activity at issue in *Fernandez*, cannot be reconciled with the jury's decision to acquit on at least the § 666-based Travel Act offense. Our earlier discussion of the jury instructions and the parties' arguments shows why.

In consequence of this conflict in the verdicts, we may not speculate that the facially inconsistent verdicts nonetheless necessarily reflect a rejection of § 666 exchange-theory liability, when they equally could reflect a finding of such liability. *See Powell*, 469 U.S. at 66. Our consideration of the convictions therefore prevents us from concluding that there is an available consistent reading of all of the jury's verdicts that would lead us to give the collateral estoppel effect to the Travel Act and conspiracy acquittals based on § 666 that the defendants now seek in this appeal. We therefore affirm the District Court's denial of the defendants' motion for a judgment of acquittal.

V.

That brings us to the defendants' final, separate double jeopardy argument. This argument relies on the District Court's October 25, 2013, line order. The District Court entered that line order two days after this Court's mandate in *Fernandez* issued. The line order directed entry of a judgment of acquittal on the standalone § 666 counts. The defendants thus contend that this line order constituted an irreversible acquittal of the defendants of those counts under the Double Jeopardy Clause.

The defendants base this challenge on the well-established rule that "the Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is 'based upon an egregiously erroneous foundation.'" *Evans v. Michigan*, 133 S. Ct. 1069, 1074 (2013) (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)). And that rule, the Supreme Court has held, prohibits even the court that entered a judgment of acquittal from reconsidering that judgment under at least some circumstances. *See Smith v. Massachusetts*, 543 U.S. 462, 469-75 (2005).

Whether an order counts as an "acquittal," however, is a question of substance and not of name.[12] *See Evans*, 133 S. Ct. at 1078. The determinative question is thus "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some

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[12] The government does not argue in this case that the October 25 order lacked double jeopardy effect because that order was entered before a new jury had been sworn following this Court's remand. *Cf. United States v. Tobin*, 552 F.3d 29, 31 (1st Cir. 2009) ("[J]eopardy (here, after a vacatur of a conviction and a remand) does not attach until a jury has been sworn."). We therefore do not address that issue.

or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

Here, the District Court's October 25 line order is not an acquittal under the substantive test that *Evans* and *Martin Linen* require that we apply. In *Martin Linen*, the Supreme Court found an acquittal where the district court ruled for the defendant on a motion for judgment of acquittal that the defendant made under Federal Rule of Criminal Procedure 29(c). 430 U.S. at 571-72. The district court had "plainly granted the Rule 29(c) motion on the view that the Government had not proved facts constituting criminal contempt." *Id.* at 572. It was thus "plain that the District Court . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." *Id.*

No such evaluation by the District Court is "plain," or even hinted at, by the record in this case. The line order itself states that it was entered "in accordance with" this Court's mandate. That statement suggests that the line order was merely intended as a ministerial act to carry out this Court's instructions—whatever they may have been—and not an application of law to fact regarding the defendants' "lack of criminal culpability." *Evans*, 133 S. Ct. at 1077 (quoting *United States v. Scott*, 437 U.S. 82, 98 (1978)). For that reason, the line order does not amount to a substantive acquittal by the District Court under *Evans* and *Martin Linen*.

The District Court confirmed as much in its opinion denying the defendants' motion to reinstate that order. The District Court characterized the line order's reference to acquittals—in carrying out this Court's mandate—as "an error of transcription, not an error of law." The District Court further explained that "[t]he very use of a line order, which contained no analysis

and indicated the Court's mere intent to follow the First Circuit Court of Appeals' directives, exemplifies that the [District] Court did not intend to *sua sponte* acquit defendants of the section 666 charges." And the circumstances of the order—which came immediately after this Court's mandate, and unprompted by any party and thus not in response to an acquittal motion—are consistent with the District Court's characterization of its line order.[13] We thus conclude that the District Court's line order did not constitute an acquittal under the Double Jeopardy Clause, and thus the Double Jeopardy Clause did not prevent the District Court from reconsidering it.[14]

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[13] We note that the defendants do not identify any action they took in their cases in reliance on the District Court's order before the District Court vacated it. *See Smith*, 543 U.S. at 474 ("Double-jeopardy principles have never been thought to bar the immediate repair of a genuine error in the announcement of an acquittal, even one rendered by a jury."); *United States v. Hill*, 643 F.3d 807, 867 (11th Cir. 2011) (reconsideration permitted where "[n]othing was done, or could have been done, in reliance on the acquittal ruling between the time that ruling was announced and the time it was rescinded"); *United States v. Lucas*, 516 F.3d 316, 338 (5th Cir. 2008) (no double jeopardy violation where the district court granted acquittals and then, after a weekend recess, changed its mind, as reconsideration came "before the trial progressed any further"). Nor could the defendants possibly do so, as nothing happened in the District Court in the interim. We also need not consider here whether a concrete showing of reliance unconnected to the proceedings themselves could be relevant to our analysis, as the defendants have not made any such showing here.

[14] The defendants contend that the District Court lacked authority under Federal Rule of Criminal Procedure 36 to reconsider its line order. That Rule allows courts to correct "at any time a clerical error arising from oversight or omission." Fed. R. Crim. P. 36. But whether or not Rule 36 applied in this context, district courts have the inherent authority to reconsider their interlocutory orders outside the sentencing context. *See, e.g.*,

VI.

For the foregoing reasons, the District Court's denials of the defendants' motions to "reinstate" the October 23 line order and to enter a judgment of acquittal on the standalone § 666 counts are *affirmed*.

United States v. Aguirre, 214 F.3d 1122, 1124 (9th Cir. 2000) ("[D]istrict courts generally have 'inherent authority' to decide motions for reconsideration and rehearing of orders in criminal proceedings." (quoting *United States v. Barragan-Mendoza*, 174 F.3d 1024, 1028 (9th Cir. 1999))). In any event, the defendants' Rule 36 argument is not grounded in the Double Jeopardy Clause, and so we lack appellate jurisdiction to address that argument in this appeal. *See Abney v. United States*, 431 U.S. 651, 663 (1977); *see also United States v. MacDonald*, 435 U.S. 850, 860 n.7 (1978) ("Admittedly, there is value—to all but the most unusual litigant—in triumphing before trial, rather than after it, regardless of the substance of the winning claim. But this truism is not to be confused with the quite distinct proposition that certain claims (because of the substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner) should be resolved before trial.").

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Filed: 12/23/2013]

Criminal No. 10-232 (FAB)

UNITED STATES OF AMERICA,

Plaintiff,

v.

JUAN BRAVO-FERNANDEZ;
HECTOR MARTINEZ-MALDONADO,

Defendants.

MEMORANDUM AND ORDER

BESOSA, District Judge.

The First Circuit Court of Appeals has vacated defendants Bravo and Martinez's 18 U.S.C. § 666 convictions and remanded the case for further proceedings. *United States v. Fernandez*, 722 F. 3d 1, 39 (1st Cir. 2013). Explaining that the jury instructions permitted the jury to convict under a legally erroneous gratuity theory, the court of appeals indicated that "[t]he government may not pursue a conviction on that ground if Defendants are retried." *Id.* at 28. Defendants now contend that despite the theoretical availability of bribery as the viable theory under which a second section 666 conviction could be pursued, "the record makes clear that the jury rejected that any bribery occurred in this case through its acquittals on the

conspiracy and Travel Act charges." (Docket No. 652 at p. 1.) They argue that double jeopardy prevents the government from relitigating federal bribery, and that acquittals on the section 666 charges are warranted. Because the defendants fail to meet their burden under the collateral estoppel doctrine, the Court **DENIES** their motions.

I. Issue Preclusion/Collateral Estoppel Standard

The "collateral estoppel" or "issue preclusion" prong of the Double Jeopardy Clause of the Fifth Amendment "precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Fernandez*, 722 F.3d at 33 (citing *Yeager v. United States*, 557 U.S. 110, 117-18 (2009); *Ashe v. Swenson*, 397 U.S. 436, 443-44 (1970); and *United States v. Orrego-Martinez*, 575 F.3d 1, 6 (1st Cir. 2009)). "The burden of demonstrating that the issue was actually decided in the first prosecution rests upon the defendant." *United States v. Lanoue*, 137 F.3d 656, 662 (1st Cir. 1998); *Dowling v. United States*, 493 U.S. 342, 350 (U.S. 1990).

Although a defendant need not satisfy "a standard of absolute certainty," he or she carries the burden of proving "unequivocally" that the jury verdict necessarily included an implicit factual finding in the defendant's favor. *See United States v. Marino*, 200 F.3d 6, 10 (1st Cir. 1999) (citing *United States v. Aguilar-Aranceta*, 957 F.2d 18, 25 (1st Cir. 1992) (abrogated by *Yeager* on other grounds)). To decipher what a jury has necessarily decided, courts should "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Yeager*, 557 U.S. at 119-20. "The inquiry must be set

in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Id.* (citing *Ashe*, 397 U.S. at 444). The First Circuit Court of Appeals has explicitly held that "[w]here it is impossible to determine whether the particular issue was previously resolved in a defendant's favor, preclusive effect must be denied." *Lanoue*, 137 F.3d at 662.

II. The Parties' Arguments

Defendants point to the jury's verdicts on counts I and II[1] to argue that "the jury made repeated findings of fact that demonstrate that no bribery occurred in this case." (Docket No. 652 at p. 3); (Docket No. 645 at p. 2. n. 2.) ("The [a]cquittal on the conspiracy count means there was no agreement to commit bribery, and the acquittal on the Travel Act counts predicated on Puerto Rico bribery charges also means no bribery occurred. The government cannot relitigate those facts."). They claim that the jury unanimously rejected the notion that there was a conspiracy to offer or receive things of value in violation of section 666, and they attempt to make factual deductions to arrive at the conclusion that the jury's finding must reflect a rejection of both the gratuity and bribery theories of section 666 liability. (Docket No. 652 at pp. 3-5.) Simi-

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[1] Count I of the Indictment charged defendants with violating 18 U.S.C. § 371 by conspiring to: (a) commit federal program bribery, and (b) travel in interstate commerce in aid of racketeering. (Docket No. 1 at pp. 5-6.) Count II charged defendants with violating 18 U.S.C. § 1952(a)(3)(A) by traveling in interstate commerce with the intent to "[p]romote, establish, carry on, and facilitate the promotion, establishment, and carrying on, of an unlawful activity," specifically (a) federal program bribery in violation of § 666, and (b) bribery in violation of P.R. Laws Ann., tit. 33, §§ 4360 and 4363. (Docket No. 1 at pp. 19-20.)

larly, defendants claim that it would have been impossible for the jury not to have found facts to satisfy certain elements of the Travel Act charges, and thus they aver that the jury must have "rejected the notion that either defendant engaged in conduct that would violate § 666 . . . ." *Id.* at pp. 6-7.

III. Analysis

There is no question that federal bribery was an issue before the jury in the first trial. On the verdict form, the jury explicitly *convicted* defendant Bravo of federal program bribery in count IV, and defendant Martinez of federal program bribery in count V.[2] (Docket No. 438 at p. 5.) That unanimous finding necessarily means that the jury found all elements of section 666 federal program bribery to be proven beyond a reasonable doubt.[3] The First Circuit Court of Appeals

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[2] Defendants first seek for the Court to avoid altogether the consideration of counts IV and V, claiming that "a vacated conviction is as meaningless as a hung count," and "[a]s a nullity, the Court cannot give a vacated conviction any continuing effect." (Docket No. 652 at p. 8.) As a threshold matter, defendants provide no convincing authority that the Court must decide their double jeopardy claim solely by analyzing the jury's findings on counts I and II and without referencing the jury's findings on counts IV and V (*See* Docket No. 652 at pp. 7-8; Docket No. 664 at p. 5.) In this case, defendants' conspiracy convictions in counts IV and V were vacated for legal error, and it is precisely the jury's findings of fact "on all counts, including the special verdicts, [] viewed in their entirety" that need to be analyzed in order to determine what the jury necessarily decided. Accordingly, the Court will consider the jury's findings in counts IV and V.

[3] Accordingly, the jury unanimously agreed that defendant Bravo gave, offered, or agreed to give any thing of value to any person; that defendant Bravo did so corruptly with the intent to influence or reward an agent of the Puerto Rico government in connection with any business, transaction, or series of transac-

vacated those convictions, however, due to legal error; the court of appeals held that the jurors were permitted to convict under an impermissible gratuity theory as well as a bribery theory. *Fernandez*, 722 F.3d at 26-27. In arguing that "the *only* way that the jury's verdicts can be interpreted is as a rejection of a bribery theory," (Docket 672 at p. 1), defendants essentially ask the Court to find from counts I and II that the jury convicted defendants of counts IV and V *on a gratuity theory* alone. The Court's task now is to determine whether the issue of section 666 federal bribery *under the bribery theory* was indeed decided in the defendants' favor. Upon review of the record and in light of the *Fernandez* opinion, the Court cannot find a single, definitive answer. The inherent uncertainty involved

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tions of the Puerto Rico government; that this business, transaction, or series of transactions involved any thing of a value of $5,000 or more; and that the Puerto Rico government, in a one-year period preceding May 15, 2005, or during the one-year period following May 15, 2005, received benefits of more than $10,000 under any Federal program involving a grant, contract subsidy, loan, guarantee, insurance or other assistance. (Docket No. 433 at p. 29.)

Similarly, the jury unanimously agreed that defendant Martinez was an agent of the Commonwealth of Puerto Rico government whose duties included those of an elected Senator of the Commonwealth of Puerto Rico, as charged; that defendant Martinez solicited, demanded, accepted or agreed to accept any thing of value from another person; that defendant Martinez did so corruptly with the intent to be influenced or rewarded in connection with some business, transaction, or series of transactions of the Puerto Rico government; that this business transaction or series of transactions involved any thing of a value of $5,000 or more; and that the Puerto Rico government, in a one-year period preceding May 15, 2005, or during the one-year period following May 15, 2005, received benefits of more than $10,000 under any Federal program involving a grant, contract subsidy, loan, guarantee, insurance or other assistance. (Docket No. 433 at pp. 33-34.)

in arriving at that conclusion prevents defendants from meeting their burden and precludes the Court from granting defendants' motion.

To begin, the Court cannot accept defendants' argument that when the jury checked "no" as to the federal program bribery predicates for liability in counts I and II, "that was a unanimous acquittal" that may be interpreted as such in a double jeopardy issue preclusion analysis. (Docket No. 670 at p. 2.) The government interprets the same language and check marks on the verdict form to be "non-findings—i.e., guilty verdicts in which the jury merely did not unanimously agree on a particular supporting basis for that verdict." (Docket 668 at p. 5.) Reading the check marks as the jury's "unambiguous[][4] stat[ement] on the verdict form that Bravo did *not* conspire to violate § 666," the First Circuit Court of Appeals noted, "the jury did render a conspiracy judgment with respect to Section 666, rejecting federal bribery as a direct object of the conspiracy." *Fernandez*, 722 F.3d at 34. Those statements tend to weigh in favor of the defendants' interpretation of the verdict form. The First Circuit Court of Appeals' interpretation of any *unanimity* reflected by the check marks, however, better supports the government's view. *See Fernandez*, 722 F. 3d at 34-35 ("In other words, although the jury was unanimous in finding that Martinez was guilty of conspiring to do something illegal, they were not unanimous in their view of what the illegality was."). Pursuant to that reasoning, the "no" check marks on the federal program bribery predicates in counts I and II could indicate the jury *did not unanimously find* section 666 bribery to be the object of the conspiracies

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[4] The Court must note defendant Bravo's *misleading* and *erroneous* citation to the First Circuit Court of Appeals' term "unambiguous" as "unanimous." (*See* Docket No. 672 at p. 2.)

in count I and the underlying racketeering of travel in count II. That is not equivalent to stating that the jury *unanimously found* that section 666 bribery was *not* the object of the conspiracy or predicate of the travel, or even further, as defendants argue, that the jury unanimously rejected that bribery occurred at all. The confusing format of the verdict form does not preclude the possibility that the jury's check marks could represent hung counts—not acquittals—that *Yeager* would preclude the Court from reviewing in an issue preclusion double jeopardy analysis. There is an alternate interpretation to defendants' interpretation of the verdict form that obscures the conclusion. Given the further difficulty of conclusively discerning what facts and theories underlaid the jury's check marks, the Court is not convinced that issue preclusion is warranted.

Even if the jury's "no" check marks in counts I and II were interpreted to be unanimous findings of acquittal, the Court is not persuaded that it can glean the underlying facts and theory used to make those findings. Without conclusive proof as to what factors were at play in the jury room, the Court disagrees that the jury's findings on the verdict form signify an "unequivocal" rejection of the bribery theory. Pointing to evidence presented at trial, defendants argue there is no question that an agreement existed between Bravo and Martinez, overt acts were taken, and that interstate travel occurred; they thus contend that *the only way* the jury could have checked "no" next to the section 666 predicates in counts I and II is if the jury did not find all elements of a section 666 claim itself to be met. (Docket No. 652 at pp. 3-7.) Taking counts I and II together in isolation, defendants' reading may be plausible. If the jury's "no" check marks next to the federal program bribery object of conspiracy in count I and the federal program bribery predicate of the

Travel Act in count II *truly indicated* a total rejection of bribery, however, it seems to the Court that acquittals as to the substantive bribery counts IV and V necessarily would have followed.[5] *See United States v. Aguilar-Aranceta*, 957 F.2d 18, 24 (1st Cir. 1992) (abrogated on other grounds) (assuming that the jury acted rationally and concluding that because knowledge was an element of one count, a rational jury "could not have been so inconsistent as to find 'no knowledge' as to one count[] and 'knowledge' as to the other"). The fact that the jury unanimously found that all elements of the substantive section 666 charge *were met* when they convicted defendants of counts IV and V would seem to suggest, contrary to defendants' theory, that at least one *other* element of the conspiracies in count I and the Travel Act in Count II was not satisfied. The crux of defendants' argument—that a rational jury *could not* have found the absence of an agreement, an overt act, or interstate travel—supports a competing interpretation of the jury's findings: that the jury acted irrationally and the verdict simply was inconsistent.

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[5] Defendants appear to disagree. They initially argue that the jury's check marks in counts I and II reflect "a rejection of both [the bribery and gratuity] theories," (Docket No. 652 at p. 3), but later claim that a rational jury "could conclude a defendant had not committed bribery . while at the same time convicting the same defendant under a gratuity theory under Section 666." (Docket No. 652 at p. 8.). Thus, they aver, "a conclusion that the jury found a gratuity and not bribery is the logical way to reconcile the verdict." *Id.* at 8.

The Court cannot subscribe to defendants' view that the jury convicted only when it was given the "reward" language in count III and acquitted every time it was told it had to find "in exchange for" bribery, thus indicating that the gratuity instructions were decisive. All jury instructions were considered as a whole, and instructions relevant to counts I and II directed the jury to consider the erroneous section 666 instructions

United States v. Powell, 469 U.S. 57, 69 (1984) ("It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the [substantive section 666] offense and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense."). As the Supreme Court has enlightened, "issue preclusion is predicated on the assumption that the jury acted rationally," *Yeager v. United States*, 557 U.S. 110, 124 (2009), and "[the] most that can be said [of inconsistent verdicts] is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions . . . ." *Dunn v. United States*, 284 U.S. 390, 393 (1932). Once a jury reaches inconsistent results, "principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful." *Powell*, 469 U.S. at 68 (1984) (emphasis added). The possibility that the jury acted irrationally and issued inconsistent verdicts in this case is not, as defendants would have the Court believe, "quite beside the point," (Docket No. 672 at p. 3); rather, it is a competing theory whose mere existence, coupled with the ambiguous jury instructions,[6] is fatal to defendants' issue preclusion claim. *See Marino*, 200 F.3d at 11 (affirming a district court's denial of collateral estoppel because of ambiguous jury instructions and the apparent irrationality of the jury's verdicts) (internal citations omitted).

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[6] "In order to demonstrate a unanimous vote, the face of a verdict sheet may not alone be sufficient Jury instructions are part of that analysis." *United States v. Merlino*, 310 F.3d 137, 142 (3d Cir. 2002) (citing *Marino*, 200 F.3d at 8-11 in favor of rejecting defendants' collateral estoppel arguments because "their jury charge contained considerable ambiguity").

Given the legal errors in the jury instructions, the Court is unpersuaded that any definitive conclusion about the underlying facts or theory can be gleaned from the check marks in counts I or II. The First Circuit Court of Appeals has ruled that the jury instructions regarding section 666 were contradictory and legally erroneous:

> While the language in Jury Instruction 22 correctly states the requirements for a bribery conviction, it was not sufficient to offset the flatly contrary language in Jury Instructions 20 and 21. This is particularly so because the gratuities theory was offered in the instructions on the § 666 counts themselves, whereas the correct bribery language was in a subsequent global instruction that applied to both the Puerto Rico and federal bribery counts.

Fernandez, 722 F.3d at 20. It is clear that certain paragraphs within those jury instructions "had no place in the § 666 instructions," *id.* at 26, and that the jury instructions regarding bribery in this case were not relatively straightforward; rather, "their jury charge contained considerable ambiguity." *See Marino*, 200 F.3d at 10; *see also Merlino*, 310 F.3d at 142 ("Because, however, of the supplemental instructions given by the District Court, [the jury's] check marks are ambiguous."). Given that the jury instructions for the conspiracy charge required the jury to find beyond a reasonable doubt that an agreement existed "to commit bribery concerning federal funds, pursuant to 18 U.S.C. § 666," (Docket No. 433 at p. 18), and that the jury instructions for the Travel Act charge directed the jury to search for the elements of section 666 "elsewhere in these instructions," (Docket No. 433 at pp. 21-22), the Court cannot rule out the likely possibility that the

jury considered the erroneous and "flatly contrary" jury instructions #20 and #21 in deciding counts I and II. Considering the jury instructions and verdict form, as well as all circumstances from the proceeding, the Court is unable to glean whether the bribery or gratuity theory was selected as the basis for analyzing counts I and II. It agrees with the government that defendants present a convoluted approach of "meander[ing] through competing interpretations of the jury's seemingly inconsistent verdict[7] in an effort to patch together a conclusion that requires the Court to act as an independent factfinder," (Docket No. 663 at p. 3), and it finds defendants' theory to impermissibly require substantial "speculation into what transpired in the jury room." *See Yeager*, 557 U.S. at 122. Neither the Court nor the parties have an ability to seek conclusive proof as to what factor was at play in deliberation, and defendants' attempt to discern underlying factual determinations in the jury's verdict "is not reasoned analysis; it is guesswork." *See Yeager*, 557 U.S. at 121-22. The lack of certainty as to what findings were made by the jury in this case precludes the Court from applying the collateral estoppel doctrine to the counts involving section 666. As the First Circuit Court of Appeals noted:

> While normally we presume juries follow their instructions, the more tenebrous those instructions, the more difficult it may be for

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[7] *United States v. Standefer*, 610 F.2d 1076, 1095 (3d Cir. 1979) ("The precise determination of what a jury decided and why can be particularly difficult In jury cases[,] verdicts frequently are internally inconsistent. It is for this reason that the law long ago abandoned the search for absolute consistency in jury verdicts, however desirable such a result might be in the abstract.") (citing *Dunn*, 284 U.S. at 393).

> defendants to demonstrate unequivocally on appeal that the jury necessarily predicated its verdict on a particular finding. So it is here, since we cannot determine with any reasonable degree of reliability that the jury interpreted the pertinent aspects of its charge in the manner asserted by [defendants].

Marino, 200 F.3d at 10.

Finally, although the First Circuit Court of Appeals did not explicitly conclude that the theory upon which the jury convicted defendants of section 666 is unclear, its reasoning, coupled with its ultimate decision to vacate and remand the defendants, appears to support such a finding. *See Fernandez*, 722 F.3d at 20 ("The evidence showed that Martinez supported the Senate Projects *after* the Las Vegas trip—he voted in support of both bills within a week of returning—**which is consistent with a quid pro quo, and therefore with a bribery theory.**") (bolded emphasis added); *Id.* ("However, he *first* took actions in support of Senate Projects 410 and 471—such as submitting the bills to the Senate—weeks or months *before* the trip to Las Vegas, **which is consistent with a gratuity theory.**") (bolded emphasis added). Tasked with determining "whether the judgment . . . should be vacated and the case remanded for further proceedings," the First Circuit Court of Appeals invoked the double jeopardy issue preclusion analysis to determine the fate of Bravo's conspiracy conviction in count I. It refrained, however, from engaging in that analysis as to the section 666 charges in counts IV or V. **This is so, despite the defendants' explicit argument before the First Circuit Court of Appeals that "[t]he jury *rejected* the government's theory of bribery,"** (Court of Appeals Case No. 12-1290,

Document No. 00116373686, p. 51.), and "the logical conclusion of his argument" also implicated the collateral estoppel prong of the double jeopardy clause. *See Fernandez*, 722 F.3d at 33 n. 25.

IV Conclusion

Defendants have not met their burden of demonstrating that double jeopardy collateral estoppel precludes the government from retrying them on the section 666 charges. Given the ambiguities in the jury verdict form and the jury instructions, as well as the possibility that the jury acted irrationally in issuing an inconsistent verdict, it is impossible to determine whether the jury necessarily decided the issue of bribery in defendants' favor, and preclusive effect must be denied. *See Lanoue*, 137 F.3d at 662. Accordingly, the Court will not grant defendants' motion. *See Aguilar-Aranceta*, 957 F.2d at 25 ("Only an **unequivocal** showing that the issue sought to be foreclosed by the defendant from subsequent reconsideration **was definitely, and necessarily decided** by a jury in a final judgment, and in the defendant's favor, will convince us to collaterally estop the government from relitigating that issue in the second trial.") (emphasis added).

IT IS SO ORDERED.

San Juan, Puerto Rico, December 23, 2013.

s/ Francisco A. Besosa
FRANCISCO A. BESOSA
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Filed: 11/08/2013]

Criminal No. 10-232 (FAB)

UNITED STATES OF AMERICA,

Plaintiff,

v.

JUAN BRAVO-FERNANDEZ;
HECTOR MARTINEZ-MALDONADO,

Defendants.

ORDER

On June 26, 2013, the First Circuit Court of Appeals issued an opinion directing this Court to enter a judgment of acquittal on the conspiracy charges against the defendants. *United States v. Fernandez*, 722 F. 3d 1, 39 (1st Cir. 2013). The First Circuit Court of Appeals also vacated the defendants' 18 U.S.C. § 666 convictions and remanded the case for further proceedings consistent with its opinion. *Id*. On October 25, 2013, this Court entered a line order to follow the First Circuit Court of Appeals' mandate. (Docket 642.) The line order read in full:

> ORDER re 639 U.S.C.A. Judgment and 640 U.S.C.A. Judgment as to Juan Bravo-Fernandez and Hector Martinez-Maldonado. The mandate having been issued (Docket No.

> 641), in accordance with the Judgments of the Court of Appeals (Docket Nos. 639 and 640), a judgment of acquittal shall be entered as to defendant Martinez's conspiracy count, as to defendant Bravo's conspiracy conviction, and as to both defendants' section 666 convictions.

Id.

Later that day, through the government's motion for clarification, (Docket 643), the Court became aware of its oversight in its line order. Instead of *vacating* both defendants' section 666 convictions, the Court entered an order of *acquittal*, contrary to the Court of Appeals' mandate. To remedy the oversight, the Court immediately vacated the entire order, this time directing the Clerk "to enter a Judgment of Acquit[t]al "only as to defendant Martinez's and defendant Bravo's conspiracy counts. The defendants' section 666 convictions are VACATED." (Docket 644.)

The next day, defendants filed a joint motion for acquittal reinstatement, arguing that the Court's judgment of acquittal on the section 666 counts was proper, should have ended the case, and is irreversible. (Docket 645.) Citing the First Circuit Court of Appeals' *Fernandez* opinion, they claim that "where a Court orders an acquittal[,] the decision cannot be reconsidered, regardless of the correctness of the district court's decision." *Id.* at 2 (internal punctuation and citation omitted). Double jeopardy, defendants contend, prohibits the Court from vacating the acquittal after it—either "rightly or wrongly"—entered it. They thus demand that the Court re-instate the initial acquittal. *Id.* at 3.

The Court flatly rejects defendants' unfounded contentions that "there is no legal authority whatsoever that authorizes a Court to vacate a prior order of acquittal" and that the Court had no power to correct the oversight contained in its order. (Docket at 645 at p. 5.) Courts of appeals have explicitly remanded cases to lower courts to amend errors contained in judgment orders. *See, e.g., United States v. Bailey*, 691 F.2d 1009, 1019 (11th Cir. 1982) (perceiving a typographical error in a district court's judgment order and remanding the case "to correct an apparent typographical error in the Judgment Order"). Federal Rule of Criminal Procedure 36 ("Rule 36") also explicitly provides that "[a]fter giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission." Fed. R. Crim. P 36. The First Circuit Court of Appeals has explained that Rule 36 "applies to straightforward clerical and technical errors." *United States v. Ranney*, 298 F.3d 74, 81 (1st Cir. 2002). Those errors are "merely of recitation, of the sort that a clerk or amanuensis might commit, mechanical in nature." *United States v. Guevremont*, 829 F.2d 423, 426 (3d Cir. 1987). Transcription errors are thus protected. *U.S. v. Becker*, 36 F.3d 708, 709 (7th Cir. 1994). Rule 36 is generally inapplicable to judicial errors and omissions of law, because it is not meant to provide an opening for litigation over the merits. *United States v. Fahm*, 13 F.3d 447, 454 n.8 (1st Cir. 1994). The Court's line order language deeming defendants' section 666 counts "acquitted" instead of "vacated," however, is an error of transcription, not an error of law. The Court clearly referenced the First Circuit Court of Appeals' mandate in its first line order and explicitly sought to

implement the mandate "in accordance with the Judgments of the Court of Appeals." (Docket 642.) Defendants' implication that the oversight somehow constitutes a conduction of "further proceedings" allowed on remand entirely misses the mark. As all parties and the Court were aware, the First Circuit Court of Appeals' opinion was unambiguously to result in the reversal of defendants' conspiracy charges, and the vacating—not acquittal—of their section 666 convictions. The very use of a line order, which contained no analysis and indicated the Court's mere intent to follow the First Circuit Court of Appeals' directives, exemplifies that the Court did not intend to *sua sponte* acquit defendants of the section 666 charges. Rule 36, therefore, allows the Court to have corrected its oversight in its order.

Defendants' argument that a court's dismissal of a charge is binding, regardless of whether it was "rightly or wrongly" decided, is also misplaced. The First Circuit Court of Appeals' "rightly or wrongly" language refers to the correctness of a district court's acquittal reached after engaging in factual assessments and/or legal determinations. *See Fernandez*, 722 F.3d at 36-37; *United States v. Pacheco*, 434 F.3d 106, 112-14 (1st Cir. 2006). Here, the Court did no such thing; it merely intended to transfer and apply the First Circuit Court of Appeals' mandate to the trial docket, not to issue an acquittal *sua sponte* without any kind of analysis. In no way should its error be construed as "a resolution, correct or not, of some or all of the factual elements of the offense charged." *Fernandez*, 722 F.3d at 36; *Pacheco*, 434 F.3d at 112. The double jeopardy concepts cited by defendants, therefore, are not pertinent the issue before the Court.

In short, defendants are not entitled to a "reinstatement" of acquittal because the line order's section 666 acquittal language had no legal basis. The Court never intended to grant defendants acquittal—the order included a straightforward technical error "arising from oversight." *See* Fed. R. Crim. P. 36. Accordingly, defendants' joint motion is **DENIED.**

IT IS SO ORDERED.

San Juan, Puerto Rico, November 8, 2013.

s/ Francisco A. Besosa
FRANCISCO A. BESOSA
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[Filed: 06/26/2013]

Nos. 12-1289, 12-1290

UNITED STATES OF AMERICA,

Appellee,

v.

JUAN BRAVO FERNANDEZ;
HECTOR MARTÍNEZ MALDONADO,

Defendants, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Francisco A. Besosa, *U.S. District Judge*]

Before Howard, Lipez, and Thompson, *Circuit Judges.*

Martin G. Weinberg, with whom *David Z. Chesnoff*, *Chesnoff & Schonfeld*, *Kimberly Homan*, *Jose A. Pagan*, and *Pagan Law Offices* were on brief, for appellant Bravo Fernandez.

Abbe David Lowell, with whom *Christopher D. Man* and *Chadbourne & Parke LLP* were on brief, for appellant Martínez Maldonado.

Peter M. Koski, Deputy Chief, Criminal Division, Public Integrity Section, United States Department of Justice, with whom *Lanny A. Breuer*, Assistant Attorney General, and *Mary Patrice Brown*, Deputy Assistant Attorney General, were on brief, for appellee.

June 26, 2013

LIPEZ, *Circuit Judge*. This case presents multiple issues of substantial importance, including a question of first impression in this circuit on the interpretation of the federal program bribery statute, 18 U.S.C. § 666. Defendants are a Puerto Rico legislator and a Commonwealth businessman who were charged, inter alia, with unlawfully exchanging a trip to Las Vegas to attend a prize fight for favorable action on legislation. A jury returned guilty verdicts against both men, Juan Bravo Fernandez ("Bravo") and Hector Martínez Maldonado ("Martínez"), and they now challenge their convictions on numerous grounds. Foremost is their contention that the jury was allowed to convict on a gratuity theory which is beyond the scope of § 666.

Unlike most circuits to have addressed this issue, we conclude that § 666 does not criminalize gratuities. Because the district court's instructions permitted the jury to find guilt on the § 666 counts based on a gratuity theory, Defendants' convictions on that count must be vacated. In addition, we conclude that the Double Jeopardy Clause, though for reasons that differ for each Defendant, entitles both men to acquittal on their respective conspiracy charges.

I.

A. Factual Background

We briefly summarize the relevant facts, reserving for our analysis a more detailed discussion of the facts relevant to each issue presented on appeal. We view the facts in the light most favorable to the jury's verdicts. *See United States v. Ciresi*, 697 F.3d 19, 23 (1st Cir. 2012).

From January 2005 until early 2011, Martínez served in the Senate of the Commonwealth of Puerto Rico.[1] When Martínez became a senator he was assigned to the Public Safety Committee, where he served as chairman. Bravo was the president of Ranger American, a private firm that provides security services, including armored car transportation and security guard staffing.

In early 2005, Bravo advocated for the passage of legislation related to the security industry in Puerto Rico. One of these bills, Senate Project 410, addressed issues pertaining to security at shopping malls, while the other, Senate Project 471, involved licensing requirements for armored car companies. The government produced testimony at trial that the passage of these bills would have provided substantial financial benefits to Ranger American. As chairman of the Public Safety Committee, Martínez was in a position to exercise a measure of control over the introduction

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[1] The record does not specify the duration of Martínez's tenure in the Puerto Rico Senate. We take judicial notice of the fact that he resigned his seat in early 2011. *See* Fed. R. Evid. 201(b) (allowing a court to take judicial notice of a fact "not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned").

and progression of the bills through the Committee and the Senate.

On May 14, 2005, prominent Puerto Rican boxer Félix "Tito" Trinidad was scheduled to fight Ronald Lamont "Winky" Wright at the MGM Grand Hotel & Casino in Las Vegas, Nevada. On March 2, Bravo purchased four tickets to the fight at a cost of $1,000 per ticket. The same day, Martínez submitted Senate Project 410 for consideration by the Puerto Rico Senate. On April 20, Martínez presided over a Public Safety Committee hearing on Senate Project 471 at which Bravo testified. The next day, Bravo booked one room at the Mandalay Bay Hotel in Las Vegas. On May 11, Martínez issued a Committee report in support of Senate Project 471.

Bravo arranged for first-class airline tickets to Las Vegas for himself, Martínez, and another senator, Jorge de Castro Font.[2] In Las Vegas, the three men stayed in separate rooms at the Mandalay Bay for two nights. Bravo paid for Martínez's room the first night, and de Castro Font paid for Martínez's room the second night. The men, along with de Castro Font's assistant, went out to dinner the day before the fight, with Bravo footing the $495 bill. The men attended the Tito Trinidad fight the next night, using the $1,000 tickets Bravo had purchased.

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[2] In 2008, Jorge de Castro Font was indicted on numerous counts relating to corruption by an elected official. *See United States v. De Castro-Font*, 587 F Supp. 2d 353, 355 (D.P.R. 2008). On January 29, 2009, de Castro Font pled guilty to 21 counts of the indictment filed against him. He received a sentence of sixty months' imprisonment. *See United States v. De Castro-Font*, 08-CR-337-01(FAB), Doc. 353 (D.P.R. May 17, 2011).

The day after the fight, Bravo, Martínez, and de Castro Font flew from Las Vegas to Miami, where they spent the night in individual hotel rooms at the Marriott South Beach. The rooms were reserved and paid for by Bravo at a total cost of $954.75. The next day, on May 16, the three returned to Puerto Rico.

On May 17, de Castro Font, acting as Chair of the Committee on Rules and Calendars, scheduled an immediate vote on the floor of the Puerto Rico Senate for Senate Project 471. Both de Castro Font and Martínez voted in support of the bill. The next day, Martínez issued a Committee report in favor of Senate Project 410. On May 23, de Castro Font scheduled an immediate vote on the floor of the Senate for Senate Project 410. Again, both de Castro Font and Martínez voted for the bill.

B. Procedural Background

On June 22, 2010, a grand jury returned an indictment charging Bravo and Martínez with (1) violating 18 U.S.C. § 371 by conspiring to (a) commit federal program bribery, and (b) travel in interstate commerce in aid of racketeering; (2) violating 18 U.S.C. § 1952(a)(3)(A) by traveling in interstate commerce with the intent to "[p]romote, establish, carry on, and facilitate the promotion, establishment, and carrying on," of unlawful activity, specifically (a) federal program bribery in violation of § 666, and (b) bribery in violation of P.R. Laws Ann., tit. 33, §§ 4360 and 4363; and (3) federal program bribery in violation of § 666. Martínez was additionally indicted for obstruction of justice, in violation of 18 U.S.C. § 1512(b)(3).

The case went to trial on February 14, 2011. On March 7, 2011, a jury convicted Bravo of conspiracy to travel in interstate commerce in aid of racketeering (count one), interstate travel in aid of racketeering with the intent to promote bribery in violation of Puerto Rico law (count two), and federal program bribery (count four). The jury found Martínez guilty of conspiracy (count one), but checked "No" as to each potential object of the conspiracy. He was also convicted of federal program bribery (count five). The jury acquitted Martínez of interstate travel in aid of racketeering (count three) and obstruction of justice (count six).

The trial court granted Bravo's motion for judgment of acquittal on count two, finding that the repeal of the Puerto Rico bribery laws before the trip took place made it impossible for Bravo to satisfy the "thereafter" element[3] of a Travel Act violation. It initially "dismissed" Martínez's conviction on count one because the jury rejected both potential objects of the conspiracy, but then "reinstated" the conviction the next day, and eventually dismissed it without prejudice. On March 1, 2012, the district court sentenced both defendants to 48 months of imprisonment. Bravo received a fine of $175,000 and Martínez a fine of $17,500.[4]

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[3] *See infra* Part V.

[4] Bravo and Martínez both filed motions for bail pending appeal before the district court, and both motions were denied. Martínez began serving his sentence on March 1, 2012, while Bravo began serving his on May 7, 2012. Bravo began serving his sentence later because of some health issues. Defendants subsequently brought their motions for bail pending appeal before us, and, in early March 2012, both were denied. Following oral argument in November 2013, we received Defendants'

C. Issues on Appeal

Both Defendants challenge their substantive § 666 convictions on numerous grounds. Martínez challenges on double jeopardy grounds the district court's decision to reinstate his conspiracy conviction and then dismiss it without prejudice. Bravo also challenges his conspiracy conviction, arguing, among other things, that the judgment of acquittal on the Travel Act count requires the entry of judgment of acquittal on the conspiracy count, as § 666, given the findings by the jury, cannot serve as an object of the conspiracy to violate the Travel Act.

II.

Defendants raise several challenges to the scope of the federal program bribery statute, 18 U.S.C. § 666, and, identifying certain elements of the statute, they also claim that the circumstances of this case do not satisfy any of those elements. We review the questions of law raised in their arguments de novo, *United States v. Place*, 693 F.3d 219, 227 (1st Cir. 2012); to the extent that their claims challenge the sufficiency of the government's evidence, we again employ de novo review, appraising the proof in the light most favorable to the verdict, *United States v. Rodríguez-Vélez*, 597 F.3d 32, 38 (1st Cir. 2010).

A. Agents

Section 666 requires the government to show that the individual receiving or soliciting the bribe was "an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof." 18 U.S.C.

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renewed motions for bail pending appeal on December 11, 2012. They were granted on January 2, 2013.

§ 666(a)(1). The term "agent" is defined as "a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative." *Id.* § 666(d)(1). Defendant Martínez maintains that he could not be convicted under § 666(a)(1)(B) because he was not an agent of the Commonwealth of Puerto Rico. Defendant Bravo argues that because neither Martínez nor de Castro Font were agents of the Commonwealth, he cannot be guilty of bribing them pursuant to § 666(a)(2).

1. The Scope of the Agency

At the outset, we reject any notion that state legislators are categorically exempt from prosecution under § 666. Indeed, the plain language of the statute includes a "representative" of a "government" in the list of positions that fall under the statute's definition of "agent," 18 U.S.C. § 666(d)(1), and there is no more classic government "representative" than a legislative branch officer. *See United States v. Lipscomb*, 299 F.3d 303, 333 (5th Cir. 2002) ("Congress clearly sought to apply § 666 to legislative-branch officials."); *United States v. Sunia*, 643 F Supp. 2d 51, 67 (D.D.C. 2009) (acknowledging that "a legislator who misuses his legislative authority to facilitate corrupt practices affecting agency programs that receive federal funds may well fall within the ambit of § 666").

Defendants' more nuanced argument is that the government failed to sufficiently specify the entity for which Martínez and de Castro Font were agents. They maintain that Martínez may only be appropriately classified as a representative (and thus an agent) of the Puerto Rico Senate, and not—as the indictment alleged—of the Commonwealth as a whole. This

distinction is significant, Defendants claim, because the Puerto Rico Senate itself had no connection with, or control over, the federal funds identified by the two government witnesses, and without such a connection the government cannot show that "the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program." 18 U.S.C. § 666(b). If the $10,000 threshold is not met, then the actions of the agents of the non-qualifying organization, government, or agency—or the actions of others with respect to those agents—cannot implicate § 666.

Once again we need go no further than the plain language of the statute to conclude that Martínez and de Castro Font may be properly considered "agents" of the Commonwealth of Puerto Rico. Among the five types of entities for which one may be an agent within the meaning of § 666 is a state government.[5] *See* 18 U.S.C. § 666(a)(1), (2) (referring to "an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof"). The Puerto Rico Senate is a constituent part of the Commonwealth government, created by the Puerto Rico Constitution. *See* P.R. Const. art. III, § 1. Its members are thus part of the limited category of government officials who represent the "State" as a whole, unlike employees of localities or of agencies at every level of government. As such, they easily fall within the concept of "an agent of . . . a State . . . government." Martínez and de Castro

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[5] Under § 666, the definition of "State" includes "a State of the United States, the District of Columbia, and any *commonwealth*, territory, or possession of the United States." 18 U.S.C. § 666(d)(4) (emphasis added). Because "State" is a term of art in § 666, we shall refer to Martínez and de Castro Font as "State senators."

Font were thus properly considered agents of the Commonwealth of Puerto Rico under § 666.

At trial, the Associate Director for the Office of Budget and Management testified that during 2005—the year of the charged conduct—the Commonwealth received over $4.7 billion in federal funds. Because Martínez and de Castro Font are agents of the Commonwealth, the evidence was sufficient to show that they are agents of a "government . . . [that] receives, in any one year period, benefits in excess of $10,000 under a Federal program." 18 U.S.C. § 666(b).

2. Agent Control of Expenditures

Defendants argue that being an "agent" under § 666 must include an element beyond merely representing the entity. Framing their argument partially in constitutional terms, they assert that, to establish the requisite link to Congress's authority to legislate under the Necessary and Proper Clause, an "agent" under § 666 "must be 'authorized to act on behalf of [the entity] with respect to its funds.'" *United States v. Whitfield*, 590 F.3d 325, 344 (5th Cir. 2009) (quoting *United States v. Phillips*, 219 F.3d 404, 411 (5th Cir. 2000)); *see also Sabri v. United States*, 541 U.S. 600, 605 (2004) (describing Congress's authority under the Necessary and Proper Clause). Defendants maintain that the government failed to adduce any evidence at trial establishing that either Martínez or de Castro Font, acting as senators, had the authority to control the expenditure of funds by any entity receiving federal funds, and that the senators therefore do not qualify as "agents" for purposes of § 666.

We disagree. Neither the statutory language nor constitutional principles lead to such a restricted understanding of the provision. As the Eleventh

Circuit recently noted when presented with this argument, "[n]owhere does the statutory text either mention or imply an additional qualifying requirement that the person be authorized to act *specifically with respect to the entity's funds*." *United States v. Keen*, 676 F.3d 981, 989-90 (11th Cir. 2012). The statute merely requires that the individual be "authorized to act on behalf of another person or government." 18 U.S.C. § 666(d)(1). In interpreting the text of a statute, "we will not depart from, or otherwise embellish, the language of a statute absent either undeniable textual ambiguity, or some other extraordinary consideration, such as the prospect of yielding a patently absurd result." *Pritzker v. Yari*, 42 F.3d 53, 67-68 (1st Cir. 1994) (citations omitted); *cf. Salinas v. United States*, 522 U.S. 52, 57-58 (1997). Defendants fail to show that any absurd result would follow from a reading loyal to the plain meaning of the statute.

The Supreme Court's and this circuit's § 666 jurisprudence support the conclusion that the statute incorporates no embellishment on the concept of "agent." Indeed, the Supreme Court has repeatedly rejected constructions of § 666 that would impose limits beyond those set out in the plain meaning of the statute. In *Salinas*, for example, the Court rejected a defendant's attempt to read into the statute an extra-textual requirement of proof that "the bribe in some way affected federal funds, for instance by diverting or misappropriating them, before the bribe violates § 666(a)(1)(B)." 522 U.S. at 55-56. In reaching its conclusion, the Court pointed to the "enactment's expansive, unqualified language, both as to the bribes forbidden and the entities covered." *Id.* at 56. Seven years later, in *Sabri v. United States*, the Court rejected a similar argument that the statute requires proof of a "nexus" between a bribe or kickback and

some federal money. It noted that while "not every bribe or kickback offered or paid to agents of governments covered by § 666(b) will be traceably skimmed from specific federal payments, or show up in the guise of a *quid pro quo* for some dereliction in spending a federal grant," the absence of such links does not "portend[] . . . enforcement beyond the scope of federal interest, for the reason that corruption does not have to be that limited to affect the federal interest." 541 U.S. at 605-06; *see also Fischer v. United States*, 529 U.S. 667, 677-79 (2000) (adopting broad reading of "benefits" under § 666(b) in light of statutory language "reveal[ing] Congress' expansive, unambiguous intent to ensure the integrity of organizations participating in federal assistance programs").

We previously addressed the scope of § 666(d)(1)'s definition of "agent" in *United States v. Sotomayor-Vázquez*, 249 F.3d 1 (1st Cir. 2001). Drawing largely from the Supreme Court's interpretation of the statute in Salinas, we held that "an expansive definition of 'agent' is necessary to fulfill the purpose of § 666, i.e., to protect the integrity of federal funds." *Id.* at 8. In support of this reading, we quoted at length from the dissent in *United States v. Phillips*:

> [T]he expansive statutory definition [in § 666(d)(1)] recognizes that an individual can affect agency funds despite a lack of power to authorize their direct disbursement. Therefore, to broadly protect the integrity of federal funds given to an agency, § 666 applies to any individual who represents the agency in any way, as representing or acting on behalf of an agency can affect its funds

> even if the action does not directly involve financial disbursement.

Id. at 8 (quoting Phillips, 219 F.3d at 422 n.3 (Garza, J., dissenting)). We thus held that "an outside consultant with significant managerial responsibility" could be an "agent" of a government entity. *Id.*

In keeping with our own precedent and that of the Supreme Court, we conclude that embracing an approach faithful to the plain language of § 666 is appropriate here. Even if the officials accepting bribes do not have the ability to control the expenditure of an entity's funds, "it cannot be denied that their fraudulent conduct poses a threat to the integrity of the entity, which in turn poses a threat to the federal funds entrusted to that entity." *Keen*, 676 F.3d at 990; *see also United States v. Hines*, 541 F.3d 833, 835-36 (8th Cir. 2008). Such conduct "raise[s] the risk [that] participating organizations will lack the resources requisite to provide the level and quality of care envisioned by the program." *Fischer*, 529 U.S. at 681-82; *cf. Sabri*, 541 U.S. at 606 ("Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value."). Narrowing the scope of § 666(d)(1)'s definition of "agent" would be "inconsistent not only with the expansive, unqualified language that Congress has elected to use, but also with Congress' clear objective of ensuring the integrity of entities receiving substantial sums of federal funds." Keen, 676 F.3d at 991 (citation omitted) (internal quotation marks omitted). We therefore decline to do so.

These concerns about financial integrity also doom Defendants' constitutional argument. "[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular

federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010). In rejecting a different Necessary and Proper Clause challenge to § 666 in *Sabri*,[6] the Supreme Court wrote:

> Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare, Art. I, § 8, cl. 1, and it has corresponding authority under the Necessary and Proper Clause . . . to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars.

541 U.S. at 605.

We have no hesitation in concluding that "measures to police the integrity of entities receiving federal funds fall under the scope of this power," *Keen*, 676 F.3d at 991, even absent evidence of an agent's authority to act specifically with respect to the covered entity's funds. "Congress does not have to sit by and accept the risk of operations thwarted by local and state improbity." *Sabri*, 541 U.S. at 605. To accept that there can only be harmful effects of such dishonest conduct when the actor has authority to control the expenditure of the entity's funds would be naive; to

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[6] The defendant in *Sabri* argued that § 666 could not be constitutionally applied "because it fails to require proof of any connection between a bribe or kickback and some federal money." 541 U.S. at 604.

accept that the prohibition of such conduct by such individuals is not "rationally related" to Congress' implementation of its constitutionally enumerated powers would be an unduly restrictive application of that standard. The Supreme Court has stated that to fall within the scope of the federal interest, "[i]t is certainly enough that the statutes condition the offense on a threshold amount of federal dollars defining the federal interest, such as that provided [in § 666]." *Id.* at 606. We see no basis for departing from that view here.

B. The Transactional Element

For a bribe to fall within the purview of § 666, it must be made "in connection with any business, transaction, or series of transactions of [the covered] organization, government, or agency involving anything of value of $5,000 or more." 18 U.S.C. § 666(a)(1)(B), (a)(2). This requirement has been referred to as the "transactional element" of § 666. *United States v. Robinson*, 663 F.3d 265, 270 (7th Cir. 2011). Defendants point out that a circuit split exists as to how the $5,000 threshold in the transactional element is met, but argue that under either approach the government's evidence was insufficient. Taking this opportunity to clarify the correct standard, we conclude that under the proper approach the evidence was sufficient to satisfy the $5,000 threshold and the transactional element generally.

1. Value of Bribe or Transaction?

In determining how to calculate the $5,000 requirement, some courts have suggested that a court should look to the value of the bribe actually offered or paid. *See United States v. Abbey*, 560 F.3d 513, 521 (6th Cir. 2009) (stating that "§ 666 contains . . . a requirement

that the illegal gift or bribe be worth over $5,000"); *United States v. Spano*, 401 F.3d 837, 839 (7th Cir. 2005) ("[T]o establish a case under § 666, the government need only prove that an agent . . . was offered or accepted a bribe worth $5000 or more . . ."); *United States v. LaRue*, 170 F.3d 1026, 1028 (10th Cir. 1999) (stating that § 666 "prohibits the unlawful acceptance of anything of value of $5,000 or more"). Other courts, however, have held that the $5,000 requirement "refers to the value of the 'business, transaction, or series of transactions,' not the value of the bribe." *United States v. McNair*, 605 F.3d 1152, 1185 n.38 (11th Cir. 2010); *see also United States v. Duvall*, 846 F.2d 966, 976 (5th Cir. 1988) ("[I]t is clear that the $5000 figure qualifies the transactions or series of transactions that the recipient of the bribe carries out in exchange for receiving 'anything of value.'").

In our view, the statutory language is unambiguous and plainly requires the latter reading. Applied to the present case, § 666(a)(1)(B) prohibits a government agent from accepting or agreeing to accept "*anything of value*" from another individual "intending to be influenced or rewarded in connection with any business, transaction, or series of transactions" of that government "involving anything of value of $5,000 or more." 18 U.S.C. § 666(a)(1)(B) (emphasis added). Section 666(a)(2) prohibits offering, giving, or agreeing to give "*anything of value*" to an individual with the "intent to influence or reward" a government agent "in connection with any business, transaction, or series of transactions" of that government "involving anything of value of $5,000 or more." *Id.* § 666(a)(2) (emphasis added). The thing accepted or agreed to be accepted in § 666(a)(1)(B)—and the thing given or offered in § 666(a)(2)—is the bribe. Thus, the bribe can be

"anything of value"—it need not be worth $5,000. The $5,000 element instead refers to the value of the "business" or "transaction" sought to be influenced by the bribe. "In other words, the subject matter of the bribe must be valued at $5,000 or more; the bribe itself need only be 'anything of value.'" *Robinson*, 663 F.3d at 271.

We note, however, that the value of the bribe may be relevant in determining the value of the bribe's objective. In *United States v. Marmolejo*, 89 F.3d 1185 (5th Cir. 1996), for example, the court looked to the value of bribes where the subject matter of the bribes consisted of "intangible items." The defendants in *Marmolejo* were two local law enforcement officers who had agreed to permit conjugal visits between an inmate and his wife (and his girlfriend) in exchange for a monthly payment of $6,000 and $1,000 per conjugal visit. *Id.* at 1191. The court noted that "[t]he transactions involved something of value—conjugal visits that [the prisoner] was willing to pay for," *id.* at 1193—and it looked to "traditional valuation methods" to estimate that value, *id.* at 1194. The court concluded that the prisoner's willingness to pay $6,000 per month plus $1,000 per visit set the market value for the conjugal visits, and it thus found that the transactions between the prisoner and the two defendants "involved something of value of $5,000 or more." *Id.* at 1194 (internal quotation marks omitted).

Hence, where the subject matter of the bribe is a "thing of value" without a fixed price, courts may look to the value of the bribe as evidence of the value of the "business, transaction, or series of transactions." That collateral use does not alter the proposition that the bribe itself need only consist of "anything of value."

2. "Business or transaction" requirement

Defendants maintain that the enactment of Senate Projects 410 and 471 should not be considered to be "in connection with any business, transaction, or series of transactions . . . involving anything of value of $5,000 or more" under § 666. They offer several justifications for this position. We find none of them persuasive.

First, Defendants focus on the "in connection with" language. Their attack is anchored in a Fifth Circuit case, *United States v. Whitfield*, which involved two state judges who were convicted of accepting bribes from an attorney in exchange for favorable rulings in his cases. 590 F.3d at 335. The government argued, and the court assumed, that the judges were "agents" of the Administrative Office of the Courts ("AOC"), a Mississippi state agency that received over $10,000 in federal funds and was "charged with assist[ing] in the efficient administration of the *nonjudicial* business of the courts of the state." *Id.* at 344 (emphasis added) (citation omitted) (internal quotation marks omitted). The court held, however, that the judges' rulings were not made "in connection with" the business or transactions of the AOC, as they were made while the judges were performing purely *judicial* duties. *Id.* at 346-47. Here, Defendants maintain that the federal funds identified by the government went to the Puerto Rico Departments of Education and Treasury, and because there is no nexus between the Departments of Education and Treasury and the act of legislating Senate Projects 410 and 471 in the Puerto Rico Senate, the legislation was not "in connection with" the business or transactions of the federally funded entity.

Whatever the merits of *Whitfield*'s "nexus" requirement, they are not implicated in this case, as we have determined that Martínez and de Castro Font were agents of the Commonwealth of Puerto Rico, which receives federal funds. When the judges in *Whitfield* were acting in their capacity as judicial decisionmakers, they were not acting within their scope as agents of the AOC, as the AOC was specifically limited to the nonjudicial business of the courts. By contrast, when Martínez and de Castro Font were acting in their capacity as legislators, they were performing the precise functions that members of a state legislative body perform as agents of a state government. The legislative acts that constituted the subject of the bribes had a direct "connection with the business, transaction, or series of transactions" of the Commonwealth of Puerto Rico.

Second, Defendants argue that the passing of Senate legislation cannot be considered "business" or a "transaction" under § 666. The thrust of their argument is that the terms "business" and "transaction" should be construed narrowly to encompass only commercial conduct, and "the Senate does not conduct business or financial transactions through legislating."

In *Salinas*, the Supreme Court rejected a defendant's similar attempt to impose a narrowing construction on § 666. 522 U.S. at 57 There, the defendant argued that federal funds must be affected to violate § 666(a)(1)(B). *Id.* at 56. Looking to the language of the statute, the Court concluded that the word "any," which precedes the business or transaction clause, undercuts the attempt to impose the defendant's narrow interpretation. *Id.* at 56-57. The Court's emphasis on the expansive language in

§ 666(a)(1)(B) in *Salinas* suggests that the courts should avoid imposing narrowing constructions on that language. Furthermore, such a reading would foreclose large swaths of government activity that, though technically "non-commercial," could be profitable for unscrupulous individuals to attempt to influence. This narrow construction would be contrary to Congress's intent. *See id.* at 56 (citing § 666's "expansive, unqualified language, both as to the bribes forbidden and the entities covered," as evidence of legislative intent to construe statute broadly). Recently confronting this argument, the Seventh Circuit stated:

> The "business" of a federally funded "organization, government, or agency" is not commonly "business" in the commercial sense of the word. An interpretation that narrowly limits the scope of the transactional element to business or transactions that are commercial in nature would have the effect of excluding bribes paid to influence agents of state and local governments. This contradicts the express statutory text.

Robinson, 663 F.3d at 274; *see also Marmolejo*, 89 F.3d at 1191-92. We agree, and hold that the business or transaction clause in § 666 does not limit the statute's reach to purely commercial conduct.

Third, Defendants focus on the word "involving,"[7] and posit that in order to satisfy § 666, the profit that

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[7] *See* 18 U.S.C. § 666(a)(1)(B) (prohibiting an agent from, inter alia, accepting or agreeing to accept anything of value "intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization,

Ranger American would stand to gain from the passage of the Senate Projects would "have to have been a part of or a necessary consequence of the legislation or have been included in its scope to satisfy the $5,000 requirement." Because the legislation itself was "revenue-neutral" and gave nothing directly to Ranger American, Defendants maintain that neither of the Senate Projects "involved" prospective revenues for Ranger American (and, by extension, Bravo).

We find no support in the case law or the statutory language for this unnecessarily restrictive interpretation of § 666. Even if legislation is revenue-neutral on its face, it is sufficient if the direct and foreseeable effect of that legislation would be to give the individual offering the bribe a particular desired result—assuming, of course, that the transaction involved something of value of $5,000 or more. Here, the government presented evidence that the foreseeable effect of the passage of Senate Project 471 would be a change in the armored car service industry, which in turn would result in financial benefits to Ranger American and Bravo far exceeding $5,000. This impact is sufficient to satisfy the "involving" requirement of § 666.[8]

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government, or agency *involving* anything of value of $5,000 or more") (emphasis added).

[8] For the reasons discussed above, we also reject Defendants' claim that it would somehow violate the Due Process Clause to apply § 666 to state senators who receive bribes in connection with legislation pending before them. Such prosecutions fall squarely within the plain terms of § 666. *See United States v. Councilman*, 418 F.3d 67, 84-85 (1st Cir. 2005) (rejecting defendant's argument that court engaged in "unforeseeably expansive interpretation" of criminal statute, as acts alleged constitute "'conduct that the statute . has fairly disclosed to

3. Sufficiency of the Evidence

With the appropriate understanding of the statute in mind, we can easily reject Defendants' sufficiency challenge as to the $5,000 requirement. Miguel Portilla, the president of Capitol Security—a company with which Ranger American competed—testified that Senate Project 471, which sought to amend Law 108,[9] would have forced Ranger American's only competitors in the armored car protection business to close down, thereby ensuring that Ranger American would have an effective monopoly on that sector of the security industry in Puerto Rico. Nestor Medina, the former general manager of Loomis Puerto Rico—a subsidiary of Loomis U.S., an armored car service—testified that Loomis controlled roughly 35% of the armored car service industry, Ranger American 52%, and Brinks the remainder. Medina stated that Loomis Puerto Rico netted $1.5 million in profits in 2005, and that there would therefore be an extra $1.5 million in additional profits available for other armored car companies to capture if Loomis were to leave the market.[10] Because, according to Portilla's testimony,

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be within its scope.'" (quoting *United States v. Lanier*, 520 U.S. 259, 266 (1997))).

[9] Portilla testified that Law 108 regulates the licensing of security agencies in Puerto Rico.

[10] Defendants take issue with certain of the district court's evidentiary rulings as to Medina's testimony. These arguments do not affect our sufficiency analysis for two reasons. First, Defendants would have suffered no prejudice by this testimony. Portilla's testimony—which is not challenged by Defendants—alone provides sufficient evidence on this issue. Any error with respect to the admission of Medina's testimony would therefore be harmless. Second, reviewing the district court's evidentiary rulings under the proper standard, *see United States v. Appolon*, 695 F.3d 44, 60 (1st Cir. 2012), we cannot say that the district

Ranger American would have been the only company left in that market, it is reasonable to conclude that Bravo's company would stand to capture a substantial portion of that profit. This testimony provided sufficient evidence for a reasonable jury to conclude that Senate Project 471 was worth $5,000 or more to Bravo.

III.

Defendants challenge the district court's jury instructions as to the § 666 counts on several grounds. We need reach only Defendants' contention that the court's instructions, reinforced by the government's closing argument, permitted the jury to find them guilty of offering and receiving a gratuity, rather than a bribe. This claim necessarily encompasses the argument that § 666 does not in fact criminalize gratuities, a question of first impression in this circuit and an issue that has generated considerable debate in the courts and among commentators.

"We review de novo preserved claims of legal error in jury instructions, but we review for abuse of discretion claimed errors in instructions' form or wording." *Uphoff Figueroa v. Alejandro*, 597 F.3d 423, 434 (1st Cir. 2010). In our review, "we look to the challenged instructions in relation to the charge as a whole, asking whether the charge in its entirety—and in the context of the evidence—presented the relevant issues to the jury fairly and adequately." *Drumgold v. Callahan*, 707 F.3d 28, 53 (1st Cir. 2013) (quoting *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487,

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court abused its discretion in permitting Medina to testify on redirect about his views regarding Senate Project 471 and its potential impact on Loomis, nor in its decision denying recross of Medina.

503 (1st Cir. 2011)) (internal quotation marks omitted).

Even if we find that a court's instructions were erroneous, we will vacate only if we determine that the error was prejudicial "based on a review of the record as a whole." *Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, 552 F.3d 47, 72 (1st Cir. 2009).

We begin by reviewing the instructions. Because we agree that they allowed a gratuities theory of guilt, we then consider the scope of § 666.

A. The Instructions

1. Background

Three of the district court's thirty-six jury instructions are relevant here. The first is Jury Instruction 20, titled "Bribery Concerning Programs Receiving Federal Funds, 18 U.S.C. § 666(a)(2)." This instruction concerns Defendant Bravo. It explains that

> Defendant Bravo is accused of corruptly giving, offering, or agreeing to give things of value to defendant Martínez and/or Jorge de Castro-Font, with intent to influence or reward defendant Martínez and/or de Castro-Font in connection with a business, transaction, or series of transactions of the Commonwealth of Puerto Rico government involving more than $5,000.

Much of the language that follows this introduction tracks the language of the statute and is not problematic. For instance, paragraphs two through four of Jury Instruction 20 state the following:

> For you to find defendant Bravo guilty of bribery, you must be convinced that the Government has proven each of the following things beyond a reasonable doubt:
>
> First, that defendant Bravo gave, offered, or agreed to give any thing of value to any person;
>
> Second, that defendant Bravo did so corruptly with the intent to influence or reward an agent of the Puerto Rico government in connection with any business, transaction, or series of transactions of the Puerto Rico government . . . .

This same type of statute-tracking language is found in the second relevant instruction, Jury Instruction 21, titled "Bribery Concerning Programs Receiving Federal Funds, 18 U.S.C. § 666(a)(1)(B)." This instruction concerns the § 666 charges against Defendant Martínez. Paragraphs two through five state:

> For you to find defendant Martínez guilty of bribery, you must be convinced that the Government has proven each of the following things beyond a reasonable doubt:
>
> First, that defendant Martínez was an agent of the Commonwealth of Puerto Rico government whose duties included those of an elected Senator of the Commonwealth of Puerto Rico, as charged;
>
> Second, that defendant Martínez solicited, demanded, accepted or agreed to accept any thing of value from another person;

> Third, that defendant Martínez did so corruptly with the intent to be influenced or rewarded in connection with some business, transaction or series of transactions of the Puerto Rico government . . . .

However, certain parts of these two instructions include language that does not track the statute. Among these are paragraph ten of Jury Instruction 20 and paragraph eleven of Jury Instruction 21. Paragraph ten states:

> When considering the First and Second elements above, I instruct you that a defendant is not required to have given, offered, or agreed to give a thing of value before the business, transaction, or series of transactions. Rather, the Government may prove that defendant Bravo gave, offered, or agreed to give the thing of value before, *after*, or at the same time as the business, transaction, or series of transactions. Therefore, the government does not need to prove that defendant Bravo gave, offered, or agreed to offer the trip to Las Vegas *before* defendant Martínez performed any official action or series of acts.

(Emphases added.) Paragraph eleven of Jury Instruction 21 appears to have a purpose similar to that of paragraph ten of Jury Instruction 20, though paragraph eleven is concerned with the timing of Defendant Martínez's solicitation, demand, acceptance, or agreement to accept the thing of value:

> When considering the Second and Third elements above, I instruct you that a defendant is not required to have accepted or

> received a thing of value before the business, transaction, or series of transactions. Rather, the Government may prove that defendant Martínez solicited, demanded, accepted, or agreed to accept the thing of value before, *after*, or at the same time as the business, transaction, or series of transactions. Therefore, the Government does not need to prove that defendant Martínez solicited, demanded, accepted or agreed to accept the trip to Las Vegas *before* defendant Martínez performed any official act or series of acts.

(Emphases added.)

The final relevant instruction is Jury Instruction 22, titled simply "Bribery." This instruction states in full:

> I have used the word "bribery" in these instructions. Bribery requires that the government prove beyond a reasonable doubt the existence of a *quid pro quo* or, in plain English, an agreement that the thing of value that is given to the public official is in exchange for that public official promising to perform official acts for the giver. It is not sufficient that the thing of value is made to curry favor because of the official's position or that there is some connection in time or place with an official act that is promised to the giver; rather there must be an agreement that the thing of value was offered by defendant Bravo and accepted by Senator Martínez in exchange for a promise to perform an official act.

Defendants maintain that the district court's directions in Jury Instructions 20 and 21 allowed the jury to convict Martínez and Bravo of a gratuity offense. They argue that a permissible construction of Jury Instruction 20 could read as follows:

> [T]he Government may prove that defendant Bravo . . . offered . . the thing of value . . *after* . . . the business, transaction, or series of transactions. Therefore, the government does not need to prove that defendant Bravo . . . offered . . . the trip to Las Vegas *before* defendant Martínez performed any official action or series of acts.

Similarly, Jury Instruction 21 could be read to state:

> [T]he Government may prove that defendant Martínez . . . agreed to accept the thing of value . . *after* . . the business, transaction, or series of transactions. Therefore, the Government does not need to prove that defendant Martínez . agreed to accept the trip to Las Vegas *before* defendant Martínez performed any official act or series of acts.

Defendants argue that if Bravo had not offered Martínez anything before Martínez performed an official act, and Martínez had therefore not accepted (or even agreed to accept) anything from Bravo before performing that act, any subsequent offer of a thing of value from Bravo to Martínez cannot be construed as a bribe. Instead, the offer would merely be an offer of a reward for an act taken by Martínez in the past. This, Defendants maintain, is an offer of a gratuity, not a bribe.

The government does not explicitly address this potentially problematic construction of paragraph ten of Jury Instruction 20 and paragraph eleven of Jury Instruction 21. It argues that the titles of those instructions—"Bribery Concerning Programs Receiving Federal Funds, 18 U.S.C. § 666(a)(2)" and "Bribery Concerning Programs Receiving Federal Funds, 18 U.S.C. § 666(a)(1)(B)"—make clear that the jury must find bribery, not a mere gratuity. Additionally, the government points to the unambiguous quid pro quo language of Jury Instruction 22, which, it claims, leaves no doubt that the jury was required to find bribery to convict Defendants of violating § 666.

Relatedly, Defendants maintain that the effect of the alleged errors in Jury Instructions 20 and 21 was magnified by certain statements made by the government during its closing argument. Defendants point to the government's statement to the jury that

> it doesn't matter when it was offered or when it was accepted . . . . These instructions clarify that—that it doesn't matter if the trip was offered before official acts were taken, at the same time official acts were taken, *or after official acts were taken*, because the crime is offering or accepting the trip with intent to influence or reward.

(Emphasis added.) This language, Defendants posit, suggests that the government need only prove a "connection" between the official acts and the offer of the Las Vegas trip, rather than a causal relationship. Defendants argue that the government essentially told the jurors that they could convict Martínez and Bravo of violating § 666 if they found that a mere gratuity—as opposed to a bribe—was offered by Bravo and accepted by Martínez.

2. Analysis

The Supreme Court explained the distinction between bribes and illegal gratuities in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999):

> The distinguishing feature of each crime is its intent element. Bribery requires intent "to influence" an official act or "to be influenced" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" an official act. In other words, for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), *or for a past act that he has already taken*.

Id. at 404-05 (third emphasis added) (construing the general federal bribery and gratuity statute, 18 U.S.C. § 201); *see also United States v. Mariano*, 983 F.2d 1150, 1159 (1st Cir. 1993) (noting in a § 666 case that "[t]he essential difference between a bribe and an illegal gratuity is the intention of the bribe-giver to effect a *quid pro quo*"). As the Eighth Circuit has noted, "[t]he core difference between a bribe and a gratuity is not the time the illegal payment is made, but the *quid pro quo*, or the agreement to exchange [a thing of value] for official action." *United States v. Griffin*, 154 F.3d 762, 764 (8th Cir. 1998). Although the timing of the payment may not provide a conclusive answer as to whether that *payment* is a bribe or a gratuity, the timing of the *agreement to make or receive a payment* may: one cannot agree to

perform an act in exchange for payment when that act has already been performed. Therefore, if the agreement to exchange a thing of value for an act is made after that act has been performed, that agreement cannot be properly viewed as an agreement to offer or accept a bribe.

With this distinction in mind, it is clear that paragraph ten of Jury Instruction 20 and paragraph eleven of Jury Instruction 21 told the jury that Bravo could be convicted under § 666 for agreeing to give Martínez a gratuity, and that Martínez could be convicted under § 666 for agreeing to accept the same. Paragraph ten explains that for a conviction under § 666, the government need not prove that Bravo offered or agreed to give Martínez anything of value before the transaction that was the subject of the "payment" took place, and that it is sufficient for conviction to show that Bravo "offered, or agreed to give the thing of value . *after* the . . transaction." Similarly, paragraph eleven suggests that the government need not prove that Martínez accepted or agreed to accept the thing of value before he performed the act that was the subject of the "payment," and that it is sufficient to show that Martínez "agreed to accept the thing of value . . . *after* . . . the transaction."

This view of the requirements of § 666 was reinforced by the government's closing argument. Like the court's jury instructions, significant portions of the government's closing argument were consistent with a bribery theory under § 666. However, in emphasizing that "it doesn't matter if the trip was offered . . . after official acts were taken," the government invited the jury to find guilt based on a gratuity theory of liability.

While the language in Jury Instruction 22 correctly states the requirements for a bribery conviction, it was not sufficient to offset the flatly contrary language in Jury Instructions 20 and 21. This is particularly so because the gratuities theory was offered in the instructions on the § 666 counts themselves, whereas the correct bribery language was in a subsequent global instruction that applied to both the Puerto Rico and federal bribery counts.

Importantly, the evidence presented at trial could support a finding that the "payment" Bravo gave and Martínez received constituted a gratuity. The evidence showed that Martínez supported the Senate Projects *after* the Las Vegas trip—he voted in support of both bills within a week of returning—which is consistent with a quid pro quo, and therefore with a bribery theory. However, he *first* took actions in support of Senate Projects 410 and 471—such as submitting the bills to the Senate—weeks or months *before* the trip to Las Vegas, which is consistent with a gratuity theory. Hence, the jury reasonably could have found that the trip was a reward for that prior conduct, rather than the quid pro quo for Martínez's later support of the bills.

Although the instructions allowed the jury to convict Bravo and Martínez of violating § 666 by giving or accepting gratuities, there remains the more difficult question of whether this instruction was legally erroneous. We have never decided whether § 666 criminalizes gratuities in addition to bribes, as the issue has never been squarely before us. We now turn to that question.

B. Section 666

1. Statutory Context

We ordinarily begin with the plain language of a statute in assessing its meaning. *See United States v. Lachman*, 387 F.3d 42, 50 (1st Cir. 2004). Here, however, much of the relevant language originates in another provision, 18 U.S.C. § 201, and it is therefore useful to take a step back and place § 666 into statutory context before looking at its specific language.

Section 666 "was born as the stepchild of another statute, 18 U.S.C. § 201." Justin Weitz, Note, *The Devil is in the Details: 18 U.S.C. § 666 after Skilling v. United States*, 14 N.Y.U. J. Legis. & Pub. Pol'y 805, 816 (2011). Section 201 criminalizes bribes and gratuities on the part of federal officials. The statute separates the crimes of illegal bribes and illegal gratuities into two sections: § 201(b) outlaws the offering of bribes to public officials, as well as the acceptance of bribes by those officials, while § 201(c) outlaws the offering and acceptance of illegal gratuities. 18 U.S.C. § 201(b), (c).

The scope of § 201 is limited to those "acting for or on behalf of the United States." As the Senate Report for § 666 noted:

> With respect to bribery, 18 U.S.C. 201 generally punishes corrupt payments to federal public officials, but there is some doubt as to whether or under what circumstances persons not employed by the federal government may be considered as a "public official" under the definition in 18 U.S.C. 201(a) as anyone "acting for or on behalf of the United States, or any

> department, agency or branch of government thereof, including the District of Columbia, in any official function." The courts of appeals have divided on the question whether a person employed by a private organization receiving Federal monies pursuant to a program is a "public official" for purposes of section 201.

S. Rep. No. 98-225, at 369 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510. Spurred by the Supreme Court's pending consideration of the meaning of § 201 in *Dixson v. United States*, 465 U.S. 482 (1984), which sought to resolve whether § 201 applied to state and local officials, Congress created § 666 as part of the Comprehensive Crime Control Act of 1984 ("CCCA"), Pub. L. No. 98-473, 98 Stat. 1837 (1984). According to the Senate Report, the purpose of § 666 was to "augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies which are disbursed to private organizations or State and local governments pursuant to a Federal program."[11] S. Rep. No. 98-225 at 369; 1984 U.S.C.C.A.N. at 3510. Significantly, the Senate Report stated that § 666 was to be interpreted "consistent with the purpose of this section to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by *bribery*." S. Rep. No. 98-225 at 370; 1984 U.S.C.C.A.N. at 3511 (emphasis added).

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[11] Section 666 has a separate provision that covers theft and fraud. *See* 18 U.S.C. § 666(a)(1)(A). That provision is not implicated in this case.

As originally enacted as part of the CCCA, the 1984 version of § 666 differed somewhat from the current law. For instance, what is now § 666(a)(2) was originally § 666(c), which read in relevant part:

> (c) Whoever offers, gives or agrees to give an agent of an organization or of a State or local government agency . anything of value *for or because of* the recipient's conduct in any transaction or matter or any series of transactions or matters involving $5,000 or more concerning the affairs of such organization or State or local government agency, shall be imprisoned not more than ten years or fined not more than $100,000 . . .

18 U.S.C. § 666(c) (1984) (emphasis added). Section 666 was amended in 1986 as part of the Criminal Law and Procedure Technical Amendments Act of 1986 ("CLPTA"), Pub. L. No. 99-646, 100 Stat. 3592 (1986). The House Report noted that "the enactment of the CCCA came during the final weeks of the 98th Congress, and, due to demanding time constraints, the CCCA contained a number of ambiguities and technical defects." H.R. Rep. No. 99-797, at 16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6138. The purpose of the CLPTA was "to eliminate these technical defects and to make minor substantive revisions." *Id.* With respect to § 666 specifically, the House Report clarified that section 42 of the CLPTA amended the statute "to avoid its possible application to acceptable commercial and business practices." *Id.* at 30. The Report explained further:

> 18 U.S.C. 666 prohibits *bribery* of certain public officials, but does not seek to constrain lawful commercial business transactions. Thus, 18 U.S.C. 666 prohibits corruptly

> giving or receiving anything of value for the purpose of influencing or being influenced in connection with any business, transaction, or series of transactions. The provision parallels the bank bribery provision (18 U.S.C. 215).

Id. at 30 n.9 (emphasis added).

Two changes to § 666 effected by the CLPTA are noteworthy. First, the "for or because of" language was replaced with "intending to be influenced or rewarded" in § 666(a)(1)(B) (the provision applicable to agents) and "with intent to influence or reward" in § 666(a)(2) (the provision applicable to the individual offering the agent something of value). This change is especially notable, as the pre-amendment language was similar to that found in 18 U.S.C. § 201(c)—§ 201's *gratuity* provision. Section 201(c)(1)(A) prohibits one from "giv[ing], offer[ing], or promis[ing] anything of value to any public official . . . *for or because of* any official act performed or to be performed by such public official," 18 U.S.C. § 201(c)(1)(A), and the complementary subsection prohibits public officials from "demand[ing], seek[ing], receiv[ing], accept[ing], or agree[ing] to receive or accept anything of value . . . *for or because of* any official act," *id.* § 201(c)(1)(B). Section 666's post-amendments language is much closer to that found in 18 U.S.C. § 201(b)—§ 201's *bribery* provision. It imposes punishment on one who gives or offers anything of value to a public official "with intent . . to influence" an official act, *id.* § 201(b)(1)(A), and on a public official who agrees to accept a thing of value "in return for . . being influenced in the performance of any official act," *id.* § 201(b)(2)(A). As the Supreme Court noted in *Sun-Diamond*, § 201(b)'s intent language implies that "for bribery there must be a *quid pro quo*—a specific intent to give or receive

something of value *in exchange* for an official act." 526 U.S. at 404-05.

The second relevant alteration is the addition of the word "corruptly" to the beginning of § 666(a)(1)(B) and (a)(2). Congress neither explained the reason for this change nor defined the term. However, this is another instance where the language of § 666 was amended in a way that brought the statute closer to § 201's bribery provision. Section 201(b)(1) punishes one who "*corruptly* gives, offers or promises anything of value to any public official," *id.* § 201(b)(1) (emphasis added), and punishes a public official who "*corruptly* demands, seeks, receives, accepts, or agrees to receive or accept anything of value," *id.* § 201(b)(2) (emphasis added). The word "corruptly" does not appear in § 201(c), the gratuities provision.

With this background in mind, we now analyze the text and structure of the statute.

2. The Meaning of § 666

The text of § 666 has remained largely unchanged since the 1986 amendments. Today, the statute reads in relevant part:

(a) Whoever . . . —

> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—
>
> > (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or

> series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; or
>
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;
>
> shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 666(a). One of the most conspicuous differences the texts of § 666 and § 201 concerns the intent element: while § 666 prohibits one from corruptly offering a thing of value with intent to "influence *or reward*" an agent, and prohibits an agent from corruptly soliciting or demanding a thing of value with intent to be "influenced *or rewarded*," the bribery provision applicable to federal officials, § 201(b), does not include the alternative "reward": it prohibits one from corruptly offering a thing of value with intent to "influence" an act, and prohibits an official from corruptly soliciting a thing of value with an intent to be "influenced." The word "reward" in § 666 is open to (at least) two different interpretations.[12]

Under the first interpretation, when a payor intends to *influence* an official's future actions, the payment constitutes a bribe; when a payor intends to *reward* the official's past conduct (or future conduct the official

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[12] Unfortunately, the legislative history contains no clues about why this word was added in the 1986 amendments.

is already committed to taking), the payment constitutes a gratuity. *United States v. Anderson*, 517 F.3d 953, 961 (7th Cir. 2008). Several circuits have adopted this reading of the language. *Id.*; *United States v. Ganim*, 510 F.3d 134, 150 (2d Cir. 2007) ("[A] payment made to 'influence' connotes bribery, whereas a payment made to 'reward' connotes an illegal gratuity."); *United States v. Zimmerman*, 509 F.3d 920, 927 (8th Cir. 2007) (citing § 666(a)(1)(B)'s "influenced or rewarded" language in support of finding that "Section 666(a)(1)(B) prohibits both the acceptance of bribes and the acceptance of gratuities intended to be a bonus for taking official action"); *United States v. Agostino*, 132 F.3d 1183, 1195 (7th Cir. 1997).

Under the second interpretation, the word "reward" does not create a separate gratuity offense in § 666, but rather serves a more modest purpose: it merely clarifies "that a bribe can be promised before, but paid after, the official's action on the payor's behalf." *United States v. Jennings*, 160 F.3d 1006, 1015 n.3 (4th Cir. 1998). "This definition accords with the traditional meaning of the term 'reward' as something offered to induce another to act favorably on one's behalf (for example, a bounty offered for the capture of a fugitive)." *Id.* Under this reading, the terms "influence" and "reward" each retain independent meaning. "Influence" would be used in situations in which, for instance, a payment was made to a local government commissioner in order to induce him to vote in a certain way on a particular matter. "Reward" would be used if a *promise* of payment was made, contingent upon that commissioner's vote; once the commissioner voted in the way the payor requested, a "reward" would follow. Both of these situations involve a quid pro quo, and both therefore constitute bribes.

What matters, of course, is that the *offer* of payment precedes the official act.

Moreover, a reading consistent with the second interpretation would help to explain the presence of the "corruptly" language in § 666(a)(1)(B) and (a)(2). As discussed *supra*, § 201 uses the word corruptly *only* in its bribery provision, § 201(b), not in the gratuity provision, § 201(c). The Fourth Circuit puzzled over this issue in *United States v. Jennings*, "namely, why § 666(a)(2)'s language prohibiting 'rewards' given 'corruptly' should be interpreted to cover gratuities, when under § 201 *any* payment made 'corruptly' is a bribe, not an illegal gratuity." *Id.* (emphasis added). If the inclusion of the word "reward" in § 666 does no more than clarify that the *payment* of a bribe can occur after the act that is the subject of the bribe is completed (so long as the *agreement* to pay the bribe for the act or acts is made before the act or acts takes place), the statute still applies only to bribery, and the use of the word "corruptly" in § 666 would comport with the use of the same word in § 201(b): any payment made "corruptly" is a bribe.[13] *Cf. Anderson*, 517 F.3d

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[13] The Second Circuit took a different view of "corruptly," in keeping with its prior conclusion that § 666 covers gratuities. In *United States v. Bahel*, the Second Circuit rejected the defendant's argument that the jury charge should have specified that the government needed to prove that he "'had been "corrupted" *at the time he acted* in his official business.'" 662 F.3d 610, 638 (2d Cir. 2011) (emphasis added). Instead, the court concluded that "in the case of a gratuity, the corrupt intent required under Section 666 refers to an individual's state of mind *at the time the payment is received*." *Id.* (emphasis added). This interpretation of "corruptly" is at odds with that of the Fourth Circuit in *Jennings*, which would appear to require the corrupt intent at the time the agent engages in the act that is the subject of the reward. While *Bahel*'s definition of "corruptly" supports the Second Circuit's interpretation of § 666 as criminalizing

at 961 ("Unlike a gratuity, a bribe is a payment made with 'a corrupt purpose, such as inducing a public official to participate in a fraud or to influence his official action.'" (quoting U.S.S.G. § 2C1.1 cmt. background)).

Another critical difference between § 666 and § 201 is the maximum penalty authorized under the statutes. One who violates § 201(b), the bribery provision, may be fined, "or *imprisoned for not more than fifteen years*, or both." 18 U.S.C. § 201(b) (emphasis added). For a violation—*any* violation—of § 666, the statute provides a punishment of a fine, a term of imprisonment of "*not more than 10 years*," or both. *Id.* § 666(a) (emphasis added). An even more striking difference in penalties, however, exists between § 666 and § 201's gratuity subsection, the latter of which calls for a term of imprisonment of "*not more than two years*," *id.* § 201(c) (emphasis added)—meaning that § 666 authorizes a term of imprisonment *five times* longer than that allowed by § 201's gratuities provision.

This dramatic discrepancy in maximum penalties between § 666 and § 201(c) makes it difficult to accept that the statutes target the same type of crime—illegal

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gratuities as well as bribes, the question raised in *Jennings* remains: if "corruptly" in fact means nothing more than a lack of an innocent motive at the time one receives payment, why does § 201—the statute upon which § 666 is based—fail to include that language in its gratuity provision when it is included in § 201's bribery provision? In other words, although the Second Circuit provides an avenue by which the word "corruptly" could be given independent meaning without cabining § 666 to bribery, that interpretation would seem to vitiate the independent meaning of the same word in § 201—again, an important consideration given that § 666 was based on § 201.

gratuities. The difference in sentences contemplated by § 201(b) and § 666 is both less dramatic and more understandable: § 201(b) targets (primarily) federal officials, while § 666 targets non-federal officials who happen to have a connection to federal funds. It is reasonable to assume that the federal government viewed corrupt federal officials involved in the receipt of bribes as more culpable.[14]

The distinct penalties for bribes and gratuities contained in § 201 highlights an obvious yet important structural difference between §§ 666 and 201: § 666 does not have separate bribery and gratuity subsections. For those circuits that have found that § 666 criminalizes gratuities, two subsections of § 666 do the same work as four subsections of § 201. We think it unlikely that Congress would condense two distinct offenses into the same subsection in § 666 when the statute upon which it is based has separate subsections for each offense. *See* George D. Brown, *Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 Notre Dame L. Rev. 247, 310 (1998) ("Congress did not . . . enact a mirror image of § 201 for nonfederal officials. Section 201 contains separate subsections to deal with bribery and gratuities. Section 666 does not. It is a mistake to attempt to read the two statutes as equal in reach."). Furthermore, if Congress did choose to condense bribes and gratuities into a single provision in § 666, it would be odd to do so by merely plugging slightly modified language from § 201(b), its bribery provision, into the statute. Surely the word "gratuity"—which is,

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[14] The legislative history of § 666 sheds no light on the reason for these differences in penalties.

of course, mentioned nowhere in the text or legislative history of § 666—was not foreign to Congress in 1986.

Although § 666 was enacted to supplement § 201, we can easily hypothesize at least two reasons why Congress may have chosen to supplement only § 201's prohibition of bribery. First, bribes are simply worse than illegal gratuities. *See Sun-Diamond*, 526 U.S. at 405 (noting the difference in the maximum sentences allowed under § 201(b) and (c) and stating that "[t]he punishments prescribed for the two offenses reflect their relative seriousness"); Charles N. Whitaker, Note, *Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for a Structured Approach*, 78 Va. L. Rev. 1617, 1622 (1992) ("The typical one- to two-year penalty under gratuities statutes evidences the lesser degree of culpability in accepting a gratuity as opposed to a bribe."). Under this theory, Congress may have viewed bribery as far more of a threat to the proper functioning of federally funded programs than gratuities. Because the application of § 666 to gratuities offenses would "take[] the statute deeply into a range of government ethics issues that may be better handled at the state level," Congress may have intended to cabin § 666 "to the hard-core area of bribery[,] where any federal interest in government integrity will be stronger." Brown, *supra*, at 310 (footnote omitted).

A second (and related) reason why Congress may have limited § 666 to bribery is to avoid what has been characterized as federal overcriminalization. *See generally* Weitz, *supra*, at 840; Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, in *In the Name of Justice* 43-56 (Timothy Lynch ed., 2009); Sanford H. Kadish, *Comment: The Folly of Overfederalization*, 46 Hastings L.J. 1247, 1249-50

(1995). In other words, Congress may have been wary of venturing too far into the thickets of state and local corruption, which often implicate the political processes of the state. *See* Brown, *supra*, at 310.

In *Sun-Diamond*, a case addressing the scope of § 201's gratuity provision, the Supreme Court noted that,

> when Congress has wanted to adopt . . a broadly prophylactic criminal prohibition upon gift giving, it has done so in a more precise and more administrable fashion.
>
> . . .
>
> [Because] this is an area where precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions . a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.

526 U.S. at 408, 412. Here, too, we feel obligated to choose the scalpel. Other than the ambiguous use of the word "rewarded," the text of § 666, as well as its legislative history and purpose, do not support the argument that Congress intended the statute to reach gratuities. The statute was amended in a way that brought its language closer to § 201's bribery provision, and further from § 201's gratuity provision, suggesting the true targets of § 666 are bribes, not gratuities. Critically, accepting that § 666 criminalizes gratuities would expose defendants convicted of gratuities violations under § 666 to penalties far greater than those faced by individuals convicted of gratuities violations under § 201—a strange outcome

that we doubt Congress intended. We therefore hold that gratuities are not criminalized under § 666.[15]

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[15] We have two responses to the thoughtful concurrence of our colleague that the statute is unclear enough that the rule of lenity precludes Defendants' convictions to the extent that they could have rested on a gratuity. First, the rule of lenity is rarely applied, and should be reserved for situations in which, "after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Barber v. Thomas*, 130 S. Ct. 2499, 2509-10 (2010) (citations omitted) (internal quotation marks omitted); *see also Muscarello v. United States*, 524 U.S. 125, 138-39 (1998) ("The simple existence of some statutory ambiguity . is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree."); *United States v. Jimenez*, 507 F.3d 13, 21 (1st Cir. 2007) ("[G]enuine ambiguity requires more than a possible alternative construction."); *accord United States v. Flemming*, 617 F.3d 252, 272 (3d Cir. 2010) (noting that "[a]pplication of the rule of lenity is called for only in rare cases"). We have construed § 666 using traditional tools of construction and find no grievous ambiguity or uncertainty. Lenity is therefore inapplicable. *See Councilman*, 418 F.3d at 83.

Second, we acknowledge, as our colleague notes, that the Federal Sentencing Guidelines Manual applies separate guidelines for bribes and gratuities under § 201, and it states that *both* of these guidelines are applicable to § 666. U.S. Sentencing Guidelines Manual app. A (2011). Some have suggested that this determination on the part of the Sentencing Commission "weighs in favor of a conclusion that § 666 encompasses bribes and gratuities." *See, e.g.*, Mark S. Gaioni, Note, *Federal Anticorruption Law in the State and Local Context: Defining the Scope of 18 U.S.C. § 666*, 46 Colum. J. L. & Soc. Probs. 207, 239-41 (2012). We disagree. The Sentencing Commission is in the business of "establish[ing] sentencing policies and practices for the Federal criminal justice system" and "develop[ing] means of measuring the degree to which the sentencing, penal, and correctional practices are effective," 28 U.S.C. § 991(b); it is *not* in the business of determining what type of conduct a statute does and does not criminalize. *See, e.g., United States v. Morales*, 590

C. Conclusion

Given this holding, the language in paragraph ten of Jury Instruction 20 and paragraph eleven of Jury Instruction 21 had no place in the § 666 instructions. By including that language, the court improperly invited the jury to convict both Martínez and Bravo for conduct involving gratuities rather than bribes. Consequently, the jury was allowed to convict Martínez and Bravo on a legally erroneous theory. Although other parts of the jury instructions accurately stated the requirements for a bribery conviction, the fact remains that the jury was confronted with the flatly contrary instructions in paragraph ten of Jury Instruction 20 and paragraph eleven of Jury Instruction 21. As noted, the government's closing argument improperly invited the jury to convict the Defendants on the proscribed "gratuity theory," and the evidence presented at trial could support a finding that the "payment" Bravo gave and Martínez received constituted a gratuity. *See supra* Part III (A)(2). Under these circumstances, we

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F.3d 1049, 1052 (9th Cir. 2010) ("Of course, the Commission can't tell federal courts how to interpret statutes."). The Commission's choice to apply the gratuities guideline to § 666 therefore carries no weight in our analysis. *Cf. DePierre v. United States*, 131 S. Ct. 2225, 2236 (2011) ("We have never held that, when interpreting a criminal statute, deference is warranted to the Sentencing Commission's definition of the same term in the Guidelines."); *United States v. Gowing*, 683 F.3d 406, 410 (2d Cir. 2012) ("The Sentencing Commission, which promulgates the Guidelines, is entitled to no deference when it interprets criminal *statutes.*"); *United States v. Palacio*, 4 F.3d 150, 155 (2d Cir. 1993) ("[U]nless the Sentencing Commission is construing its own authority as an agency, its view of the substantive meaning of a criminal statute is unlikely to be entitled to any deference." (internal citations omitted)).

cannot say "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error."[16] *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). We therefore conclude that we must vacate Defendants' convictions under § 666 because of the deficiencies in Jury Instructions 20 and 21. *See Fiore v. White*, 531 U.S. 225, 228 (2001) (holding that conviction of defendant for conduct that a "criminal statute, as properly interpreted, does not prohibit . . violate[s] due process").

IV.

Defendants argue that their convictions should be reversed because the indictment was barred by the statute of limitations. The alleged unlawful conduct at issue took place through May 2005. The indictment against Defendants was returned on June 22, 2010, more than five years after the conduct occurred. Pursuant to 18 U.S.C. § 3282(a), "[e]xcept as otherwise expressly provided by law, no person shall be

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[16] Even if a defendant has properly preserved his objection to an incorrect jury instruction, we will not set aside the verdict if we find that the error was harmless. *United States v. Sasso*, 695 F.3d 25, 29 (1st Cir. 2012). However, we measure harmless error in a criminal case using two distinct standards. The stricter standard, known as the *Chapman* standard, is "applicable mainly to issues of constitutional dimension, [and] requires the government to prove beyond a reasonable doubt that the error did not influence the verdict." *Id.*; *see Chapman v. California*, 386 U.S. 18, 23-24 (1967). The less stringent standard we cite above, called the *Kotteakos* standard, is "applicable mainly to trial errors that are not of constitutional dimension." *Sasso*, 695 F.3d at 29. Here it makes no difference what standard we apply because, even assuming the applicably of the less stringent *Kotteakos* standard, the error was not harmless. *See id.*

prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." However, Defendants signed tolling agreements waiving their right to allege an affirmative defense based on the statute of limitations.[17] Defendants maintain that (1) the tolling agreements were void because they were not properly executed by the government, and (2) even if they were not void, the tolling agreements did not extend the statute of limitations period for a gratuity theory of liability on the § 666 counts.

"We review de novo a district court's decision not to dismiss on statute of limitations grounds." *United States v. Munoz-Franco*, 487 F.3d 25, 52 (1st Cir. 2007); *see also United States v. Spector*, 55 F.3d 22, 25 (1st Cir. 1995) (applying de novo review to question of whether tolling agreement was effective waiver of defendant's rights under statute of limitations). Defendants argue that the tolling agreements never became effective because, although both Defendants and their attorneys signed them, they were never signed by the government. They rely primarily on our opinion in *United States v. Spector* to support this argument. In *Spector*, the government and the defendants sought to enter into a tolling agreement that would bar the application of the § 3282 limitations period. 55 F.3d at 23. That agreement

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[17] The record does not disclose the precise reason why Defendants signed the tolling agreements. However, "[s]uch agreements are typically entered into in exchange for the government's agreement not to indict before a certain time in the hope that further discussion may result in a more favorable disposition or prevent an indictment altogether." Robert S. Hunter, *Fed. Trial Handbook: Criminal* § 12:28 (2012).

provided that it would be effective "'upon execution by [the defendants] and their respective counsel and the United States by its counsel.'" *Id.* at 24. The agreement was signed by the defendants and their counsel, but not by counsel for the government. *Id.* We found that the tolling agreement was ineffective, pointing to, inter alia, the unambiguous language in the agreement. *Id.* at 25.

Defendants argue unpersuasively that we should extend *Spector* to the facts of this case. We summarized our holding in *Spector* as follows: "[w]here the parties have so deliberately set forth in writing the conditions necessary to make their agreement effective, we think it inadvisable for a court to condone deviation from one of the explicit terms, absent some good reason to do so." *Id.* We also explicitly limited our holding:

> We emphasize that we are not saying that, to be enforced, an agreement to extend the statute of limitations must be made in writing, or must be signed by the government. We say only that, *where the parties themselves have chosen to set forth the terms in writing*, it makes sense to hold them to those terms, absent good reason to do otherwise.

Id. at 26 n.4 (citations omitted).

Defendants' tolling agreements in the present case state: "*By signing this document*, I knowingly and voluntarily waive any rights I may have under the statute of limitations regarding charges which may result from the grand jury investigation . . . provided that such charges are brought on or before June 25, 2010." (Emphasis added.) The agreements thus make clear that their provisions will go into effect when

signed by Defendants; nothing in the agreements require counsel for the United States to sign the document as a condition of enforceability. We therefore conclude that the failure of the government to sign the tolling agreements does not render them invalid.

As to Defendants' second argument, we need not determine whether the tolling agreements cover a gratuity theory of liability under § 666, as we have found that § 666 does not criminalize gratuities. The government may not pursue a conviction on that ground if Defendants are retried.

V

Bravo challenges his conviction on count one for conspiracy to violate the Travel Act, claiming that he is entitled to a judgment of acquittal on that count.

A. Background

Count one of the indictment charged Bravo with conspiring with Martínez and de Castro Font to commit two different crimes: (1) bribery in violation of § 666 and (2) traveling in interstate commerce in violation of 18 U.S.C. § 1952 ("the Travel Act"). A Travel Act charge must identify an unlawful purpose for the travel,[18] and the Travel Act conspiracy alleged

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[18] Section 1952, which is titled "Interstate and foreign travel or transportation in aid of racketeering enterprises," states, in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—

against Bravo specified that his travel was to aid "racketeering"—a term that covers various types of unlawful activity.[19] In this case, the only racketeering conduct that has been identified by the government is bribery in violation of federal and Puerto Rico laws.[20] Indeed, count two, which alleged a substantive Travel Act violation, charged Bravo with traveling in interstate commerce with the intent to commit those two types of bribery, i.e., in violation of § 666 and in violation of Puerto Rico law.

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(3) promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform—

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both

[19] A "racketeering activity" is defined in the United States Code as "any act or threat" involving certain specified crimes, including bribery, "which is chargeable under State law and punishable by imprisonment for more than one year," as well as any act indictable under numerous federal statutory provisions, including the Travel Act. *See* 18 U.S.C. § 1961(1); *see also* 18 U.S.C. § 1959(b)(1) (adopting the meaning of "racketeering activity" set forth in § 1961).

[20] The Travel Act object of the conspiracy described in the indictment reads as follows:

> Interstate Travel in Aid of Racketeering: that is, to travel in interstate commerce from the Commonwealth of Puerto Rico to the State of Nevada, with intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on, of an unlawful activity, to wit bribery in violation of the laws of the United States and the Commonwealth of Puerto Rico, in violation of Title 18, United States Code, Sections 1952(a)(3)(A) and 2.

On count one, the jury found Bravo guilty of conspiracy, but it rejected the § 666 (federal bribery) objective. It found that he had conspired only to travel in interstate commerce "in aid of racketeering." The jurors were not asked to specify the unlawful activity that was the purpose of the travel.[21] However, on count two, the substantive Travel Act offense, the jury found Bravo guilty of traveling in interstate commerce with the intent to commit bribery in violation of Puerto Rico bribery law. The jury found that he did *not* violate the Travel Act with the intent to commit § 666 bribery. Thus, in both the context of identifying the object of the alleged conspiracy (§ 666 bribery or Travel Act) and in the context of choosing the unlawful activity that was the target of the Travel Act (§ 666 bribery or bribery under Puerto Rico law), the jury rejected the allegation that Bravo's conduct implicated the federal bribery statute.

Bravo moved for a judgment of acquittal on count two because the Puerto Rico bribery statutes that provided the predicate for the Travel Act violation were repealed before the Las Vegas trip took place. Specifically, the laws were repealed on June 18, 2004, nearly one year before the trip; the repeal became

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[21] The combination of a conspiracy offense and the Travel Act produces unusual complexity because each requires an unlawful objective. The result is that, when the two crimes are charged together, the government must show multiple layers of predicates. Hence, to prove a conspiracy to violate the Travel Act, the government must show (1) a conspiratorial agreement (2) to travel (3) in aid of a specified unlawful activity. Here, the verdict form identified only the generic "racketeering" as the purpose of the Travel Act conspiracy, though it alleged two Travel Act objectives in the substantive count: bribery under § 666 and bribery under Puerto Rico law. As noted, the jury found only the latter.

effective on May 1, 2005, about two weeks before the trip took place. Because § 1952 requires the commission of an overt act to promote the criminal object of the travel *after* the interstate travel takes place, *see* 18 U.S.C. § 1952(a), the district court granted Bravo's motion, concluding that "the acts that defendant Bravo took to fulfill the 'thereafter' requirement all occurred after May 1, 2005, and therefore, after section 4363 was repealed. Defendant Bravo cannot be convicted of conduct that was effectively not a crime at the time the offense took place." *United States v. Bravo-Fernandez*, 828 F Supp. 2d 441, 449 (D.P.R. 2011).[22]

Bravo also moved for acquittal on the conspiracy charge, arguing that the conspiracy conviction—which was based on a Travel Act violation—necessarily must fall with the substantive Travel Act charge. His theory was as follows: if the only target of the Travel Act found by the jury when considering the substantive Travel Act charge (count two) was to further a violation of the Puerto Rico statutes, and that targeted activity was not unlawful, there could be no unlawful *conspiracy* to violate the Travel Act. In other words, he argued that the conspiracy count must be dismissed because the jury verdicts rejecting § 666 as an object of the conspiracy and as a predicate for the *substantive* Travel Act charge left only the repealed Puerto Rico bribery laws as the crime the jury could have found as the racketeering activity alleged to be the target of the

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[22] Although the Commonwealth legislature enacted new bribery provisions to replace the repealed statutes, the government has not argued that the new laws provide any basis for the convictions here.

Travel Act conspiracy. In that circumstance, there was no viable predicate for the Travel Act conspiracy.

The district court denied the motion. It held that the jury could have reached different conclusions about the objective of Bravo's travel when separately considering the conspiracy and substantive Travel Act counts. Stated otherwise, the court found that the jury's unelaborated finding on count one that Bravo had *conspired* to travel "in aid of racketeering" could have reflected a finding that Bravo had conspired to violate the Travel Act with the intent to promote federal program bribery. The court considered this outcome possible even though, when considering the *substantive* Travel Act crime (count two), the jury found that Bravo did not violate the Travel Act for that purpose *and* even though the jury explicitly found (on count one) that Bravo did *not* conspire to violate § 666. The court held that any inconsistency in such a scenario was not problematic.

On appeal, Bravo reiterates his argument for acquittal on the conspiracy charge. He again asserts that it was impossible to engage in a conspiratorial agreement to travel to violate the Puerto Rico bribery statutes on May 13, 2005, two weeks after the repeal became effective and nearly a year after the legislature voted to repeal the statutes, because "one cannot conspire to commit a nonexistent crime." In addition, he maintains that, even if the district court correctly ruled that he could be convicted for conspiring to travel in connection with a bribery that is unlawful under § 666—despite the jury's rejection of federal bribery as the predicate for his substantive Travel Act offense—the conspiracy conviction cannot stand. The problem, he asserts, is that it is impossible

to tell whether the jury based its Travel Act conspiracy finding on the federal or Commonwealth statutes.

The government, noting that a defendant may be convicted on a conspiracy charge even if he does not successfully complete the crime that is the object of the conspiracy, argues that the jury could have found that Bravo conspired to travel to violate the Puerto Rico bribery laws if an overt act was taken before the statute was repealed. The government points out that the statute was still in effect when Bravo booked the hotel reservations, ordered the boxing tickets, and took other acts "which were in furtherance of the corrupt exchange." The government interprets Bravo's argument to be a legal impossibility defense—i.e., he could not be found guilty because it would have been impossible for him to commit the crime—and states that "[c]ourts have come to abolish impossibility as a defense, particularly with respect to the crime of conspiracy."

Having set the scene, we now proceed to consider whether Bravo's conspiracy conviction may stand with either § 666 or Puerto Rico bribery law as the Travel Act predicate.

B. Conspiracy to Violate the Travel Act to Promote Puerto Rico Bribery

Although the government is correct that "legal impossibility" is often an ineffective defense in a conspiracy case because a conspiracy charge does not require a completed crime, Bravo's argument implicates a more potent form of the doctrine. He invokes what has been referred to as "pure legal impossibility," which arises when no statute "proscribe[s] the result that the defendant expected, desired, and intended to

achieve." *See* Ira P. Robbins, *Attempting the Impossible: the Emerging Consensus*, 23 Harv. J. on Legis. 377, 390 (1986); *see also United States v. Farner*, 251 F.3d 510, 513 n.2 (5th Cir. 2001); *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000). "Pure legal impossibility is always a defense. For example, a hunter cannot be convicted of attempting to shoot a deer if the law does not prohibit shooting deer in the first place." *United States v. Hsu*, 155 F.3d 189, 199 n.16 (3d Cir. 1998). Although *Hsu*'s hypothetical discussed pure legal impossibility in the context of attempts, "[o]bviously a charge of conspiracy to shoot a deer would be equally untenable." *In re Sealed Case*, 223 F.3d at 779.

The type of legal impossibility that the government cites has been referred to as "mixed fact/law impossibility." Such cases "involve a factual mistake relating to a legal determination. In every case . . . a pre-existing law proscribed the actor's goal, thus distinguishing this category from pure legal impossibility." Robbins, *supra*, at 394. These cases "use[] the label 'legal impossibility' to refer to the impossibility of actually accomplishing the intended plot," although there is never "any question that if the plot had succeeded the conduct itself would be criminal." *United States v. Ali*, 561 F. Supp. 2d 265, 267-68 (E.D.N.Y. 2008).

This is a case of pure legal impossibility. The jury found a conspiracy to violate the Travel Act with the intent to facilitate racketeering activity (either federal or state bribery). The evidence shows, and the indictment alleges, that the travel underlying the charge was to take place on a specific date to coincide with the boxing match between Felix Trinidad and Winky Wright scheduled for May 14, 2005—nearly

two weeks after the repeal of the Puerto Rico bribery statutes was to go into effect. Thus, the jury could not have found Bravo guilty of conspiracy to violate the Travel Act for the purpose of aiding a violation of these *Puerto Rico* bribery laws because the alleged agreement was to travel at a time when Bravo's conduct could not violate those laws. That the plans to take the trip to Las Vegas were allegedly made before the statute's repeal took effect is of no significance, since the plans envisioned travel on a specific date—*after* May 1. In this case, "a pre-existing statute [did] not proscribe the result that the defendant expected, desired, and intended to achieve," Robbins, *supra*, at 390, because the Puerto Rico bribery statutes at issue would no longer "exist" when the travel was to take place. In short, Defendants were "conspiring" to do something that would not be prohibited by these Puerto Rico bribery laws on the date they planned to do it.[23]

An extension of the deer hunting hypothetical used in *Hsu* and *In re Sealed Case* illustrates this point. Assume that deer hunting season begins on September 1; it is against the law to hunt deer before September 1. On August 15, a man and his friend visit a sporting goods store to purchase rifles and ammunition, intending to use them to hunt deer on September 2. Are the men guilty of conspiring to illegally hunt deer? They are not: although their planning took place during a time when it would have been illegal to engage in the subject activity, no statute

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[23] We reject the government's assertion that Bravo may not benefit from the repeal without demonstrating that he had notice of it.

prohibited that activity on the date on which they planned to engage in it.

It therefore follows that, with respect to the Puerto Rico bribery basis for the alleged Travel Act violation, "since the conduct allegedly underlying the conspiracy was not a crime, no . conspiracy to commit that conduct can exist either." *Ali*, 561 F. Supp. 2d at 267.[24] The government claims, however, that even if the Puerto Rico bribery predicate must be struck, the jury could have relied on § 666 as a predicate for the conspiracy to violate the Travel Act. We now turn to that possibility.

C. Conspiracy to Violate the Travel Act to Promote Federal Bribery

The government urges us to adopt the view taken by the district court, i.e., that the jury's rejection of § 666 as a direct object of the conspiracy and as a predicate for the substantive Travel Act violations does not negate the possibility that the jury could have found that the conspiracy to violate the Travel Act involved planning to travel to violate § 666. The gist of this approach is that the jury could have found that Bravo

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[24] In this case, it is not pertinent that, at the time Bravo and the others agreed to travel, the repeal of the Puerto Rico bribery statutes at issue had not yet gone into effect. The state of the law at the time of their agreement was such that, on the day they planned to travel, such travel would not be unlawful. Hence, there was no unlawful objective of their agreement, and therefore no basis for a conspiracy charge.

It might be a different case if, at the time they agreed, the legislature had not already decided to change the state of the law effective May 1, 2005. In other words, we do not address the hypothetical situation in which Bravo and his cohorts had set their plan in motion before the legislature acted to repeal the statutes.

conspired with others to travel for the purpose of promoting federal bribery, while also finding that he neither agreed with others directly to commit federal bribery (its finding on count one) nor in fact traveled to promote federal bribery (its finding on count two). The government admits that such a view of the jury's judgments appears inconsistent, but it asserts that the verdicts are reconcilable and therefore permissible. It cites precedent in which inconsistent verdicts have been upheld. *See, e.g., United States v. Powell*, 469 U.S. 57, 69 (1984).

But the problem here is not merely the possibility of inconsistent verdicts. Rather, even if we were to assume that the jury *could* have relied on a § 666 theory in finding Bravo guilty on the Travel Act conspiracy count, we do not in fact know whether the racketeering activity found by the jury as a predicate was bribery under federal law or bribery under the repealed Puerto Rico statutes. We are thus confronted with a situation in which "the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Yates v. United States*, 354 U.S. 298, 312 (1957), *overruled on other grounds by Burks v. United States*, 437 U.S. 1 (1978). "When a jury has been presented with several bases for conviction, one of which is legally erroneous, and it is impossible to tell which ground the jury convicted upon, the conviction cannot stand." *United States v. Sawyer*, 85 F.3d 713, 730-31 (1st Cir. 1996); see also *United States v. Mubayyid*, 658 F.3d 35, 71 (1st Cir. 2011); *United States v. Kavazanjian*, 623 F.2d 730, 739-40 (1st Cir. 1980) (reversing verdict on multi-object conspiracy conviction under § 371 where one object failed to state a crime). We therefore conclude that Bravo's conspiracy conviction cannot be upheld.

But our inquiry does not end here. The question remains whether the judgment entered on count one as to Bravo must be reversed or whether it should be vacated and the case remanded for further proceedings. Generally, when we find that a conviction cannot stand because the jury may have convicted upon a legally invalid basis, we will remand for a new trial, provided that there is sufficient evidence to support a conviction on a valid basis (or bases). *See United States v. Pendergraft*, 297 F.3d 1198, 1210 (11th Cir. 2002); *Kavazanjian*, 623 F.2d at 739. The government argues for that course here. It maintains that the evidence was sufficient for the jury to find that Bravo conspired to travel in interstate commerce to violate § 666 and, hence, he should be retried on count one.

We disagree. Regardless of the sufficiency of the evidence, retrial on the conspiracy count is barred by the Double Jeopardy Clause.[25] While the Double Jeopardy Clause is widely understood to bar retrial on a charge on which a defendant was previously acquitted, *Yeager v. United States*, 557 U.S. 110, 117-18 (2009), it also "precludes the Government from relitigating any issue that was *necessarily decided* by a jury's acquittal in a prior trial," *id.* at 119 (emphasis added); *see also Ashe v. Swenson*, 397 U.S. 436, 443-44 (1970); *United States v. Orrego-Martinez*, 575 F.3d 1, 6 (1st Cir. 2009). This is known as the "issue preclusion" or "collateral estoppel" prong of the Double Jeopardy Clause. *United States v. Coughlin*, 610 F.3d 89, 95 (D.C. Cir. 2010); *United States v. Wittig*, 575 F.3d 1085, 1095 (10th Cir. 2009). In determining what was "necessarily decided" for purposes of issue

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[25] Although Bravo did not formally label his challenge to the conspiracy conviction as a double jeopardy challenge, the logical conclusion of his argument is exactly that.

preclusion, the Supreme Court has recently reaffirmed that "courts should 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" *Yeager*, 557 U.S. at 119-20 (quoting *Ashe*, 397 U.S. at 444). The Court has made clear that this "inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings,'" *id.* (quoting *Ashe*, 397 U.S. at 444), and that "the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality," *Ashe*, 397 U.S. at 444.

Here, the jury's verdict on count one did not expressly acquit Bravo on a Travel Act conspiracy whose purpose was to promote § 666 bribery. The verdict form for count one asked the jury to answer "yes" or "no" only as to whether Bravo had conspired to violate the Travel Act "in aid of racketeering," without specifying any racketeering activity. However, federal program bribery in violation of § 666 was one of the two racketeering crimes alleged in the indictment and argued by the government—the other being bribery in violation of Puerto Rico law. Significantly, the jury did render a conspiracy judgment with respect to § 666, rejecting federal bribery as a direct object of the conspiracy. The pertinent question, then, is this: by unambiguously stating on the verdict form that Bravo did *not* conspire to violate § 666, did the jury also "necessarily decide" that he did not conspire to *travel* for the purpose of violating § 666? Taking a practical, realistic approach to this question, we must answer it in the affirmative.

First, we find it difficult to fathom how the jury could have found that Bravo conspired to travel for the purpose of violating § 666 without also finding that he conspired to violate § 666. The jury's explicit rejection of the allegation that Bravo conspired to violate § 666 is strong evidence that the jury did not find federal program bribery to be the racketeering activity underlying the Travel Act conspiracy. *Cf. United States v. Cabrera*, 804 F Supp. 2d 1261, 1267-70 (M.D. Fla. 2011). Second, the jury found on count two—the substantive Travel Act count—that Bravo was guilty *only* of traveling with the intent to commit bribery in violation of Puerto Rico law. Again, the jury explicitly rejected allegations that either the conspiracy or the Travel Act conduct implicated § 666.

Given these other § 666 judgments by the jury, we conclude that its verdict on the Travel Act conspiracy can only rationally be understood as a finding that Bravo conspired to travel to Las Vegas in mid-May 2005 for the purpose of promoting Puerto Rico bribery. We will not bend over backwards to formulate some route by which the jury could have conceivably found that § 666 was the predicate of the Travel Act conspiracy when any reasonable assessment of the verdict shows that no such road was taken. We therefore conclude that re-prosecuting Bravo on count one would violate the Double Jeopardy Clause.

VI.

Martínez also challenges his conspiracy conviction. As we shall explain, although the circumstances are different from Bravo's, the outcome is the same.

A. Background

The jury indicated that it unanimously found Martínez guilty of conspiracy on count one. The verdict form listed three potential objects of the conspiracy, and the jury was instructed to "check all that you unanimously find to apply." The jury checked "No" as to each of the three identified objects of the conspiracy. In other words, although the jury was unanimous in finding that Martínez was guilty of conspiring to do something illegal, they were not unanimous in their view of what that illegality was.

Immediately after the verdict was read by the courtroom deputy, Martínez's attorney, Mr. Lowell, asked the court to strike the verdict on count one, stating: "As to Hector Martínez, they found 'no' for all the particulars, so, consequently, this is an impossibility." The court and the government were uncertain about the proper course. Lowell, however, remained steadfast, asserting that "as to Count 1, by law, you have to enter the verdict of not guilty as to Count 1 as to Mr. Martínez."

Lowell then asked the court to poll the jury individually as to count five, the substantive federal bribery count. The government recommended that the court simply take a general poll. Bravo's attorney, Mr. Chesnoff, asked that the jury be polled individually "as to every count and every specification," stating that "[y]ou have a jury that has obviously been confused about its verdict." The court rejected both defense attorneys' requests and conducted only a general poll, asking each juror if the verdict announced by the courtroom deputy was his or her verdict. This approach did not clarify the issue with the conspiracy verdict as to Martínez.

After the jury was polled, the court asked if there were any motions by the defense. Attorney Lowell reiterated his contention that "the Court must vacate Count 1." The court responded: "All right. Well, let me discharge the jury, and well—we'll deal with those legal matters later." The jury was escorted from the courtroom, and Lowell again stated that the jury's verdict on Martínez's conspiracy charge was "a legal impossibility," and "that being the case, the Court must strike that guilty verdict. There's no alternative." The government pushed back, asking the court for time to brief the issue before it made its decision. After some further back and forth, the court stated: "I agree with Mr. Lowell. Count 1 as far as Defendant Martínez is dismissed." The discussion then shifted to other matters.

In a short order issued the next day, the court sua sponte "reinstated" Martínez's conviction on count one "without prejudice of the parties having a full opportunity to brief the issues discussed in open court." Martínez filed an eighteen-page brief three days later, stating that the court's change of course was "beyond surprising" and insisting that the further proceedings ordered by the court "are an affront to the Fifth Amendment's Due Process and Double Jeopardy Clauses, and the Sixth Amendment's right to trial by jury." He argued that "[a]lthough the statutory basis for Mr. Lowell's motion and this Court's decision was not cited, it was plainly a motion made and a judgment rendered under [Federal] Rule [of Criminal Procedure] 29," and that double jeopardy therefore attached. The government filed a "non-opposition" to Martínez's motion shortly thereafter, indicating that "the Court should dismiss defendant Martínez's guilty verdict on Count One." The next day, however, the government filed a supplemental response, arguing that, at most,

Martínez would be entitled to a mistrial pursuant to Federal Rule of Criminal Procedure 33 on count one and a dismissal without prejudice, not a Rule 29 dismissal based on insufficiency of the evidence. Martínez replied that the dismissal sought and granted was a dismissal pursuant to Rule 29, that the dismissal was properly granted, and that the court's decision could not be withdrawn or relitigated, as jeopardy attached to it.

On August 30, 2011, the district court issued an order stating that the initial dismissal did not preclude a mistrial. The court stated that because it did not explicitly make a finding that the evidence was insufficient to sustain the conviction, Rule 29 was not implicated. Instead, it maintained that "the Court 'dismissed' [the] verdict based on defense counsel's claim of 'legal impossibility.'" Moreover, the court stated that even if its actions fell within the scope of Rule 29, the Double Jeopardy Clause permits a prosecution appeal to reinstate a jury's guilty verdict that a judge subsequently discarded.

B. Legal Principles

The Fifth Amendment states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V The Double Jeopardy Clause "shields a defendant from a second prosecution for the same offense after either conviction or acquittal." *United States v. Morris*, 99 F.3d 476, 478 (1st Cir. 1996). In determining whether the Double Jeopardy Clause has been violated, "a reviewing court first must ask whether jeopardy attached in the original [trial] court proceeding." *United States v. Pacheco*, 434 F.3d 106, 112 (1st Cir. 2006) (alteration in original) (citation omitted) (internal quotation marks omitted).

"Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'" *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (alteration in original) (quoting *United States v. Ball*, 163 U.S. 662, 671 (1896)). We have previously held that "[i]t is beyond cavil that, for double jeopardy purposes, the finality accorded to jury verdicts of acquittal extends equally to judicially rendered judgments of acquittal." *Pacheco*, 434 F.3d at 112. It is therefore critical to determine whether the district court's statement that "Count 1 as far as Defendant Martínez is dismissed" constitutes a judgment of acquittal.

The Supreme Court has repeatedly "emphasized that what constitutes an 'acquittal' is not to be controlled by the form of the judge's action." *Martin Linen*, 430 U.S. at 571; *see also United States v. Scott*, 437 U.S. 82, 96 (1978); *United States v. Sisson*, 399 U.S. 267, 290 (1970). Instead, a reviewing court "must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Martin Linen*, 430 U.S. at 571; *see also Pacheco*, 434 F.3d at 112. That the district court did not explicitly invoke Rule 29 in "dismissing" count one, then, is not dispositive on the issue of whether its actions constituted an acquittal. *Cf. United States v. Jorn*, 400 U.S. 470, 478 n.7 (1971) ("[T]he trial judge's characterization of his own action cannot control the classification of the action for the purposes of our appellate jurisdiction.").

The difficulty in this case is that the district court's assessment of the conspiracy charge as to Martínez does not directly engage with the facts presented at trial. Instead of the normal inquiry into factual sufficiency, the court's determination that the conspiracy count must be "dismissed" appears to be based on a legal conclusion regarding the requirements of a conspiracy conviction under 18 U.S.C. § 371—specifically, that if the jury cannot reach an agreement as to the object of a conspiracy, the conviction cannot stand as a matter of law. The Supreme Court, however, has not limited acquittals for double jeopardy purposes to cases involving factual assessments of the evidence presented to the jury. In several cases, including one decided earlier this year, the Supreme Court has held that legal determinations by the court can create a double jeopardy bar to retrial.

In *Arizona v. Rumsey*, an Arizona trial judge conducted a sentencing hearing to determine whether a defendant convicted of armed robbery and first degree murder was eligible for the death penalty. 467 U.S. 203, 205 (1984). The trial judge mistakenly held that Arizona's statutory aggravating factor covering killings for pecuniary gain was limited to "a contract-type killing situation and not robbery, burglary, etc." *Id.* at 206 (quotation marks omitted). The judge therefore found no aggravating circumstances and sentenced the defendant to life imprisonment. *Id.* The State successfully appealed to the Supreme Court of Arizona and obtained a death sentence on remand under the proper standard. *Id.* at 207-08. The U.S. Supreme Court found that the retrial on the penalty phase issue was a double jeopardy violation, because the trial judge's original "judgment, based on findings sufficient to establish legal entitlement to the life sentence, amounts to an acquittal on the merits and,

as such, bars any retrial of the appropriateness of the death penalty." *Id.* at 211. It continued:

> In making its findings, the trial court relied on a misconstruction of the statute defining the pecuniary gain aggravating circumstance. *Reliance on an error of law, however, does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits.* "[T]he fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles . affects the accuracy of that determination, but it does not alter its essential character."

Id. (quoting *United States v. Scott*, 437 U.S. 82, 98 (1978)) (emphasis added) (internal quotation marks omitted).

Just two years after *Rumsey*, the Court considered another case in which a judge's "legal determination" was at issue. In *Smalis v. Pennsylvania*, the Supreme Court of Pennsylvania held that a demurrer, which requires the court to determine "whether the evidence, if credited by the jury, is legally sufficient to warrant the conclusion that the defendant is guilty beyond a reasonable doubt," does not involve a factual determination, but rather "purely one of law," and is therefore not the equivalent of an acquittal for double jeopardy purposes. 476 U.S. 140, 143 (1986) (internal quotation marks omitted). The U.S. Supreme Court reversed in a brief opinion, stating that "[w]hat the demurring defendant seeks is a ruling that as a matter of law the State's evidence is insufficient to establish his factual guilt," which constitutes an acquittal under the Double Jeopardy Clause. *Id.* at 144.

The Court recently reaffirmed its positions in *Rumsey* and *Smalis* in *Evans v. Michigan*, 133 S. Ct. 1069 (2013). In Evans, the Supreme Court considered "whether retrial is barred when a trial court grants an acquittal because the prosecution had failed to prove an 'element' of the offense that, in actuality, it did not have to prove." *Id.* at 1074. The Court found that, in substance, the issue was no different than the one presented in *Rumsey*: it "involve[d] an antecedent legal error that led to an acquittal because the State failed to prove some fact it was not actually required to prove." *Id.* at 1076. The fact that *Evans* involved the addition of a nonessential element, while *Rumsey* involved only the misinterpretation of an essential element, was of no moment to the Court. *Id.* at 1076-77. The Court held that the trial court's "judgment, however erroneous it was, precludes reprosecution." *Id.* at 1078 (internal quotation marks omitted).

C. Application

With these decisions in mind, we have little difficulty concluding that the district court's "dismissal" of the conspiracy count against Martínez was an acquittal. Rightly or wrongly,[26] the court agreed with Lowell's assertions that a conspiracy with no object was "a legal impossibility," and that the jury's verdict

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[26] Because the correctness of the district court's decision on this issue is irrelevant, we choose not to address it, other than to note that there appears to be no case law directly on point. Martínez relies primarily upon an out-of-circuit district court case involving facts that differ materially from the present case, *United States v. Lucarelli*, 490 F. Supp. 2d 295 (D. Conn. 2007), while the government cites to an Eighth Circuit case that involved a special verdict form in a bankruptcy fraud case, *United States v. Mitchell*, 476 F.3d 539 (8th Cir. 2007). Neither offers clear guidance.

must be "struck" and the count "dismissed." In so finding, the court made a determination as to the legal requirements necessary for a conspiracy conviction under § 371 and concluded that the jury had found the evidence insufficient to meet those requirements.[27] For our purposes, it does not matter if this interpretation of § 371 added "an 'element' of the offense that, in actuality, [the government] did not have to prove," *id.* at 1074; misconstrued the actual elements of the statute, *Rumsey*, 467 U.S. at 211; or faithfully adhered to the statute's requirements. All that matters is that the district court made "a determination that the [government] had failed to prove its case." *Evans*, 133 S. Ct. at 1075.

One issue remains for our consideration. In declaring a mistrial, the district court found that even if the initial "dismissal" could be considered a judgment of acquittal, the Double Jeopardy Clause would not prevent an appeal by the government to reinstate the jury's original guilty verdict. In support of this proposition, the court cited *Smith v. Massachusetts*, which states:

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[27] Although double jeopardy cases in which courts order an acquittal based on the sufficiency of the evidence ordinarily involve the court's assessment of the evidence itself, the principles are equally applicable in this somewhat different context. Here, the court determined that the jury had functionally acquitted Martínez on the conspiracy count. *See Evans*, 133 S. Ct. at 1075 ("[A]n 'acquittal' includes a ruling by the court that the evidence is insufficient to convict, a factual finding [that] necessarily establish[es] the criminal defendant's lack of criminal culpability, and *any other rulin[g] which relate[s] to the ultimate question of guilt or innocence*." (alterations in original) (emphasis added) (citations omitted) (internal quotation marks omitted)).

> Our cases have made a single exception to the principle that acquittal by judge precludes reexamination of guilt no less than acquittal by jury: When a jury returns a verdict of guilty and a trial judge (or an appellate court) sets aside that verdict and enters a judgment of acquittal, the Double Jeopardy Clause does not preclude a prosecution appeal to reinstate the jury verdict of guilty.

543 U.S. 462, 467 (2005). Although at first blush this principle, first announced in *United States v. Wilson*, 420 U.S. 332, 352-53 (1975), seems potentially applicable to the present case, it is not.

As the Court noted in *Rumsey*, "[n]o double jeopardy problem was presented in *Wilson* because the appellate court, upon reviewing asserted legal errors of the trial judge, could simply order the jury's guilty verdict reinstated; no new factfinding would be necessary, and the defendant therefore would not be twice placed in jeopardy." 467 U.S. at 211-12. The *Rumsey* Court found that the *Wilson* exception was inapplicable to that case, because "[w]hereas the defendant in *Wilson* was not to be subjected to a second trial after an acquittal at his first, that is precisely what . . . happened" to Rumsey. The Court has made clear that the *Wilson* exception does not violate the Double Jeopardy Clause precisely because allowing appeal in those circumstances does not subject a defendant "to further factfinding proceedings going to guilt or innocence" following an acquittal. *Smith*, 543 U.S. at 467 (internal quotation marks omitted); *see also Smalis*, 476 U.S. at 145 ("[S]ubjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause.").

Here, the government presumably requested a dismissal without prejudice of Martínez's conviction so that it can reprosecute him under § 371. If we were to allow the district court to recast its acquittal as a mistrial, the government would get another opportunity to subject Martínez to "factfinding proceedings going to guilt or innocence," hoping this time for a less ambiguous result. That would be a classic instance of impermissible double jeopardy. Because the court's "dismissal" was an acquittal for double jeopardy purposes, and because the *Wilson* exception does not apply, the decision cannot be reconsidered. *See Smith*, 543 U.S. at 470-73.

VII.

For the foregoing reasons, we *reverse* Bravo's conspiracy conviction, and *reverse* the district court's order declaring a mistrial as to Martínez's conspiracy count. We direct the district court to enter a judgment of acquittal on both charges. We *vacate* Martínez's and Bravo's § 666 convictions and *remand* for further proceedings consistent with this opinion.

– Concurring Opinion Follows –

HOWARD, *Circuit Judge*, concurring in part and concurring in the judgment. I join the court's judgment, although on one issue I would reach the same result by a different route. The majority concludes, as a matter of law, that Section 666 does not criminalize gratuities. I believe that the statute is unclear enough that the rule of lenity precludes the defendants' convictions to the extent that they could have rested on a gratuity. While the majority does an admirable job of explaining its reasoning, other considerations give me pause.

First, the Supreme Court has stated that "[a]n illegal gratuity . . . may constitute merely a *reward* for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken." *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 405 (1999) (emphasis added). Thus, a "reward" can be a payment that does not influence an official's actions, a reading that the majority rejects when interpreting Section 666. Although the Court was not interpreting Section 666 or defining the word "reward," it was interpreting Section 201, a closely related statute. Thus, I hesitate to conclude that the meaning of "reward" as used in Section 666 is at odds with the Court's use of that word.

Second, a problem arises if we read the bribery provision of Section 201(b) to prohibit the same conduct as Section 666. Section 201(b) prohibits giving or receiving anything of value with the intent to "influence" or of "being influenced." 18 U.S.C. § 201(b)(1)(A), (b)(2)(A). Section 666, by contrast, prohibits giving or receiving anything of value with the intent to "influence or reward" or "to be influenced or rewarded." *Id.* § 666(a)(2), (a)(1)(B). If the scope of these prohibitions is the same, then the word "reward" has no independent meaning in Section 666, which would seem to violate the requirement that we are to give effect to every word of a statute. *See Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 724 (2011). I am not sure that this problem can be resolved by reading "reward" as clarifying how a bribe can be timed, as the majority does.

Third, Appendix A to the United States Sentencing Guidelines Manual provides that Section 2C1.2, the guideline covering gratuities, applies to both Section

666(a)(1)(B) and Section 666(a)(2). Although the Sentencing Commission cannot change the meaning of a statute, Congress does have the opportunity to review proposed guidelines before they become effective. 28 U.S.C. § 994(p).[28] Moreover, we have held that "*Chevron* deference is the proper criterion for determining whether a guideline (or, for that matter, commentary that suggests how a guideline should be read) contravenes a statute." *United States v. LaBonte*, 70 F.3d 1396, 1404 (1st Cir. 1995), *rev'd on other grounds*, 520 U.S. 751 (1997).[29] While I do not suggest that *LaBonte*'s rule applies here, the Sentencing Commission's determination that the gratuity guideline applies to Section 666 does at least give me pause as to Congress's meaning.

In the end, I would apply the rule of lenity because it is ambiguous whether Section 666 criminalizes gratuities. "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). We apply the rule of lenity "only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." *Reno v. Koray*, 515 U.S. 50, 65 (1995)

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[28] Like the majority, I am concerned with the disparity between the statutory maximum sentences for an illegal gratuity under Section 201 and for a violation of Section 666. But I would point out that an illegal gratuity carries a base offense level three levels lower than bribery does, U.S. Sentencing Guidelines Manual §§ 2C1.1(a), 2C1.2(a) (2012).

[29] When the Supreme Court decided *United States v. LaBonte*, the three dissenting justices stated that *Chevron* deference was appropriate, 520 U.S. at 777 (Breyer, J., dissenting), while the remaining justices chose not to decide the issue, *id.* at 762 n.6.

(citations omitted) (internal quotation marks omitted). Here, I can make no more than a guess as to what Congress intended Section 666 to mean. Therefore, I would hold that the defendants cannot be convicted for giving or receiving a gratuity.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

[Filed: 07/27/2015]

Nos. 14-1089 and 14-1091

UNITED STATES OF AMERICA,

Appellee,

v.

JUAN BRAVO-FERNANDEZ and
HECTOR MARTÍNEZ-MALDONADO,

Defendants, Appellants.

Before

Howard, *Chief Judge*,
Torruella,* Lynch, Lipez, Thompson,
Kayatta and Barron,
Circuit Judges.

Entered: July 27, 2015

ORDER OF COURT

Pursuant to First Circuit Internal Operating Procedure X(C), the joint petition for rehearing en banc has also been treated as a joint petition for rehearing before

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* Judge Torruella is recused and did not participate in the consideration of this matter.

the original panel. The joint petition for rehearing having been denied by the panel of judges who decided the case, and the joint petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the joint petition for rehearing and joint petition for rehearing en banc be denied.

By the Court:
/s/ Margaret Carter, Clerk

cc:

Vijay Shanker
Nelson Jose Perez-Sosa
Peter M. Koski
Martin G. Weinberg
Kimberly Homan
David Zeltner Chesnoff
Joseph C. Laws
Jose Antonio Pagan-Nieves Jr.
Lisa Schiavo Blatt
Saraliene Smith-Durrett
Christian E. Pagan-Cordoliani
Maria L. Montanez-Concepcion
Juan A. Marques-Diaz
Luis Berrios-Amadeo
David C. Indiano-Vicic

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

[Filed: 08/06/2015]

No. 14-1089

UNITED STATES,

Appellee,

v.

JUAN BRAVO-FERNANDEZ,

Defendant-Appellant.

No. 14-1091

UNITED STATES,

Appellee,

v.

HECTOR MARTINEZ-MALDONADO,

Defendant-Appellant.

Entered: August 6, 2015

ORDER OF COURT

Upon consideration of the defendants-appellants' opposed joint motion to stay the mandate, the motion is granted. The issuance of the mandate is hereby stayed for 90 days and, if within that period a timely petition for writ of certiorari is filed, shall continue until final

disposition of such petition by the United States Supreme Court. Should any petition for writ certiorari be denied, mandate shall issue forthwith. Counsel for the defendants-appellants are directed to promptly notify the Clerk of this court both of the filing of any such petition for writ of certiorari and its disposition.

By the Court:
/s/ Margaret Carter, Clerk

cc:

Vijay Shanker
Nelson Jose Perez-Sosa
Peter M. Koski
Martin G. Weinberg
Kimberly Homan
David Zeltner Chesnoff
Joseph C. Laws
Jose Antonio Pagan-Nieves Jr.
Lisa Schiavo Blatt
Saraliene Smith-Durrett
Maria L. Montanez-Concepcion
Juan A. Marques-Diaz
Luis Berrios-Amadeo
David C. Indiano-Vicic
Christian E. Pagan-Cordoliani
Seth Allen Erbe
Sonia Ivette Torres-Pabon
Abbe David Lowell
Christopher Dowden Man

Supreme Court, U.S.
FILED
FEB 10 2016
OFFICE OF THE CLERK

No. 15-537

In the Supreme Court of the United States

JUAN BRAVO-FERNANDEZ AND HECTOR MARTINEZ-MALDONADO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under the collateral estoppel component of the Double Jeopardy Clause, the jury's acquittal of petitioners on some counts bars the government from retrying petitioners on another count on which the same jury convicted petitioners, when that conviction was subsequently vacated for legal error and the jury's verdict in the first trial was inconsistent.

2. Whether a district court docket entry line order purporting to memorialize the court of appeals' judgment and erroneously stating that the court of appeals had acquitted petitioners on counts that the court had in fact vacated constitutes an acquittal by the district court precluding retrial under the Double Jeopardy Clause.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 12
Conclusion 27

TABLE OF AUTHORITIES

Cases:

Ashe v. *Swenson*, 397 U.S. 436 (1970) 9, 10, 13, 14, 16
Bates v. *United States*, 522 U.S. 23 (1997) 23
Burks v. *United States*, 437 U.S. 1 (1978) 16
Dowling v. *United States*, 493 U.S. 342 (1990) 15
Dunn v. *United States*, 284 U.S. 390 (1932) 14
Evans v. *Michigan*, 133 S. Ct. 1069 (2013) 12, 24, 26
Evans v. *United States*:
987 A.2d 1138 (D.C. 2010), cert. denied, 562 U.S. 1202 (2011) 18, 19
562 U.S. 1202 (2011) 22
People v. *Wilson*, 852 N.W.2d 134 (Mich. 2014) 19
Price v. *United States*, 473 U.S. 904 (1985) 22
Serfass v. *United States*, 420 U.S. 377 (1975) 24
State v. *Halstead*, 791 N.W.2d 805 (Iowa 2010) 21
State v. *Kelly*, 992 A.2d 776 (N.J. 2010) 18
State v. *Montoya*, 306 P.3d 426 (N.M. 2013) 19, 20
United States v. *Bruno*:
661 F.3d 733 (2d Cir. 2011) 25
531 Fed. Appx. 47 (2d Cir. 2013) 18, 19
United States v. *Citron*, 853 F.2d 1055 (2d Cir. 1988) 18, 19

Cases—Continued: Page

United States v. *Crowell*, 374 F.3d 790 (9th Cir. 2004), cert. denied, 543 U.S. 1070 (2005) 16
United States v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977) 23
United States v. *Powell*, 469 U.S. 57 (1984) 9, 14, 15, 18
United States v. *Price*, 750 F.2d 363 (5th Cir.), cert. denied, 473 U.S. 904 (1985) 18, 19
United States v. *Scott*, 437 U.S. 82 (1978) 24
United States v. *Weinstein*, 452 F.2d 704 (2d Cir. 1971), cert. denied, 406 U.S. 917 (1972) 25
United States v. *Wittig*, 575 F.3d 1085 (10th Cir. 2009) 25
Yeager v. *United States*, 557 U.S. 110 (2009) 11, 13, 14, 17, 18

Constitution and statutes:

U.S. Const. Amend. V (Double Jeopardy Clause) ..... *passim*
Travel Act, 18 U.S.C. 1952 4
18 U.S.C. 666 ..... *passim*
20 U.S.C. 1097(a) 23

Miscellaneous:

United States Courts, *Statistical Tables for the Federal Judiciary-June 2015, Criminal Cases Filed, Terminated, and Pending (Including Transfers), Tbl. D. Cases* (June 30, 2015), http://www.uscourts.gov/statistics-reports/statistical-tables-federal-judiciary-june-2015 23

In the Supreme Court of the United States

No. 15-537

JUAN BRAVO-FERNANDEZ AND HECTOR MARTINEZ-MALDONADO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 790 F.3d 41. The memorandum and order of the district court (Pet. App. 41a-53a) is reported at 988 F. Supp. 2d 191. A separate order of the district court (Pet. App. 54a-58a) is unreported. A prior opinion of the court of appeals (Pet. App. 59a-133a) is reported at 722 F.3d 1.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 2015. A petition for rehearing was denied on July 27, 2015 (Pet. App. 134a-135a). The petition for a writ of certiorari was filed on October 23, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Puerto Rico, petitioners were convicted of, *inter alia*, federal program bribery, in violation of 18 U.S.C. 666. Petitioners were sentenced to 48 months of imprisonment, to be followed by three years of supervised release. Bravo-Fernandez Judgment 1-3; Martínez-Maldonado Judgment 1-3. As relevant here, the court of appeals vacated petitioners' bribery convictions on grounds of instructional error and remanded for further proceedings. Pet. App. 59a-133a. On remand, before retrial, the district court denied two separate motions by petitioners for acquittals on the bribery charges under the Double Jeopardy Clause. *Id.* at 41a-53a, 54a-58a. The court of appeals affirmed. *Id.* at 1a-40a.

1. From January 2005 until early 2011, petitioner Hector Martínez-Maldonado was a senator for the Commonwealth of Puerto Rico. Pet. App. 61a. Petitioner Juan Bravo-Fernandez was the president of Ranger American, a private security firm in Puerto Rico that provided services such as armored car transportation and security guard staffing. *Ibid.*

In early 2005, Bravo-Fernandez began advocating for the passage of legislation related to the security industry in Puerto Rico. Pet. App. 61a. The two bills he supported—Senate Project 410 (SP 410) and Senate Project 471 (SP 471)—"would have provided substantial financial benefits" to Bravo-Fernandez and his firm. *Ibid.*

At that time, Martínez-Maldonado was chairman of the Senate's Public Safety Committee, which had jurisdiction over the two bills. Pet. App. 61a-62a. Martínez-Maldonado "was in a position to exercise a

measure of control over the introduction and progression of the bills through the Committee and the Senate." *Ibid.* Another senator, Jorge de Castro Font, was chairman of the Senate's Rules and Calendars Committee, which exercised control over which bills were brought to a vote and when. Gov't C.A. Br. 7.

On March 2, 2005, Bravo-Fernandez purchased several tickets for $1000 each to attend a professional boxing match between the popular Puerto Rican boxer Félix "Tito" Trinidad and Ronald Lamont "Winky" Wright, which was scheduled to occur in Las Vegas in May 2005. Pet. App. 62a. That same day, Martínez-Maldonado, as chairman of the Public Safety Committee, submitted SP 410 for consideration by the Senate. *Id.* at 61a-62a.

On April 20, 2005, Martínez-Maldonado presided over a Public Safety Committee hearing on SP 471, at which Bravo-Fernandez testified. Pet. App. 62a. The next day, Bravo-Fernandez reserved a hotel room at the Mandalay Bay Hotel in Las Vegas. *Ibid.* Bravo-Fernandez also arranged first-class airline tickets for himself, Martínez-Maldonado, and de Castro Font from Puerto Rico to Las Vegas. *Ibid.* On May 11, 2005, Martínez-Maldonado issued a Committee report in support of SP 471. *Ibid.*

On May 13, 2015, the day before the fight, Bravo-Fernandez, Martínez-Maldonado, and de Castro Font flew to Las Vegas. Gov't C.A. Br. 8. When they arrived, they checked in to the Mandalay Bay Hotel, where they stayed for two nights in separate rooms. Pet. App. 62a. Bravo-Fernandez paid for Martínez-Maldonado's room the first night. *Ibid.* The three men, joined by de Castro Font's assistant, went out to dinner the first night, with Bravo-Fernandez paying

the $495 bill. *Ibid.* The second night, Bravo-Fernandez, Martínez-Maldonado, and de Castro Font attended the boxing match, sitting in the $1000 seats purchased by Bravo-Fernandez. *Ibid.*

On May 15, 2005, the three men flew from Las Vegas to Miami, where they stayed at the Marriott South Beach in individual rooms that Bravo-Fernandez paid for, at a total cost of $954.75. Pet. App. 63a. On May 16, 2005, they returned to Puerto Rico. *Ibid.*

On May 17, 2005, de Castro Font scheduled an immediate Senate floor vote on SP 471. Pet. App. 63a. Martínez-Maldonado and de Castro Font both voted in favor of the bill. *Ibid.* The next day, Martínez-Maldonado issued a Committee report supporting SP 410. *Ibid.* On May 23, 2005, de Castro Font scheduled an immediate floor vote on SP 410. *Ibid.* Again, Martínez-Maldonado and de Castro Font both voted in favor of the bill. *Ibid.*

2. On June 22, 2010, a federal grand jury in the United States District Court for the District of Puerto Rico returned an indictment charging petitioners with various bribery-related offenses. Pet. App. 3a. Following a jury trial, petitioners were convicted of federal program bribery, in violation of 18 U.S.C. 666. Pet. App. 4a. The jury acquitted petitioners of conspiring to violate Section 666 and of violating the Travel Act, 18 U.S.C. 1952, in furtherance of violating Section 666. Pet. App. 4a.[1] The district court sen-

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[1] Bravo-Fernandez was additionally convicted of conspiracy to travel in interstate commerce in aid of racketeering and violating the Travel Act with the intent to promote bribery in violation of Puerto Rico law. Pet. App. 4a, 64a. Martínez-Maldonado was additionally convicted of conspiracy, but the jury "checked 'No' as to each potential object of the conspiracy." *Id.* at 64a. Following

tenced each petitioner to 48 months of imprisonment. *Id.* at 64a.

3. The court of appeals vacated petitioners' federal program bribery convictions, holding that the jury instructions had erroneously permitted the jury to find petitioners "guilty of offering and receiving a gratuity, rather than a bribe." Pet. App. 81a; see *id.* at 105a. As a matter of first impression, the court held that Section 666 criminalizes only bribes, and not gratuities. *Id.* at 91a-103a. The jury instructions were flawed, the court concluded, because they stated that the government did not need to prove that an agreement to offer or accept a thing of value was made before the recipient took official action, and thus permitted a finding of guilt based on a reward for a completed act, rather than on payment of a quid pro quo bribe. *Id.* at 82a-90a.

The court of appeals specifically noted that the evidence at trial supported a finding of guilt on both a bribery theory and a gratuity theory. Pet. App. 90a; see *id.* at 5a. Because the court could not say with certainty that the jury did not rely on a gratuity theory, it vacated petitioners' Section 666 convictions and

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the jury verdict, the district court granted Bravo-Fernandez's motion for a judgment of acquittal on the Travel Act count because the Puerto Rico bribery statutes that provided the predicate for the violation were repealed before the travel took place. *Ibid.* The court also initially dismissed Martínez-Maldonado's conspiracy conviction in light of the jury's failure to specify an object of the conspiracy, but the court then reinstated the conviction and later declared a mistrial and dismissed the count without prejudice. *Ibid.*

remanded for further proceedings. *Id.* at 104a-105a, 130a.[2]

4. The case returned to the district court for a possible retrial of petitioners on the federal program bribery charges. See Pet. App. 2a (observing that the court of appeals had "remanded for a possible new trial based on a proper theory of liability under [Section] 666."); *id.* at 108a (noting that the government could "not pursue a conviction on [a gratuity theory] if [petitioners] [we]re retried").

a. Immediately after the court of appeals' mandate issued and before any retrial, the district court issued a line order on the docket purporting to memorialize the court of appeals' judgments, stating: "[I]n accordance with the Judgments of the Court of Appeals (Docket Nos. 639 and 640), a judgment of acquittal shall be entered as to [Martínez-Maldonado's] conspiracy count, as to [Bravo-Fernandez's] conspiracy conviction, and as to both [petitioners'] section 666 convictions." Pet. App. 6a. The last portion of the docket entry was erroneous, as the court of appeals

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[2] The court of appeals also reversed Bravo-Fernandez's conspiracy conviction, holding that he could not be found guilty of conspiring to travel in interstate commerce to further a violation of Puerto Rico bribery laws because those laws had been repealed before the travel occurred. Pet. App. 108a-120a. In addition, the court reversed the district court's declaration of a mistrial and dismissal of Martínez-Maldonado's conspiracy charge without prejudice and directed the district court to enter a judgment of acquittal on that count. *Id.* at 120a-130a. The court of appeals concluded that the district court's initial dismissal of the conspiracy conviction constituted an acquittal because the district court made a determination that the government had failed to prove its case. *Id.* at 127a-130a. The court of appeals' rulings on the conspiracy convictions are not at issue here.

had vacated, not reversed, the Section 666 convictions. See *ibid.* (noting that "all parties to this appeal agree" that the line order was "mistaken"). Less than three hours later, following a motion to clarify by the government, the district court vacated the erroneous docket entry and directed the clerk to "enter a Judgment of Acquit[t]al only as to [Martínez-Maldonado's] and [Bravo-Fernandez's] conspiracy counts. The [petitioners'] section 666 convictions are VACATED." *Id.* at 55a (citation and internal quotation marks omitted).

Petitioners subsequently moved for "reinstatement" of the district court's "acquittal" on the Section 666 counts. Pet. App. 55a. The court denied the motion. *Id.* at 54a-58a. The court "flatly reject[ed]" petitioners' argument that the docket entry qualified as an acquittal that the court lacked authority to correct. *Id.* at 56a. The court stated that it had engaged in no factual assessments or legal determinations in issuing the order and that it had "merely intended to transfer and apply the First Circuit Court of Appeals' mandate to the trial docket, not to issue an acquittal *sua sponte* without any kind of analysis." *Id.* at 57a. The language "deeming [petitioners'] section 666 counts 'acquitted' instead of 'vacated'" was "an error of transcription, not an error of law." *Id.* at 56a. Because the docket entry was not a resolution of petitioners' criminal culpability, but rather was simply "a straightforward technical error arising from oversight," petitioners were not entitled to judgments of acquittal based on the line order. *Id.* at 58a (internal quotation marks omitted).

b. Petitioners separately moved for judgments of acquittal on the federal program bribery charges un-

der the Double Jeopardy Clause, arguing that collateral estoppel precluded retrial on those charges because, in petitioners' view, the jury had necessarily rejected a bribery theory when it acquitted them of conspiring to violate Section 666 and of violating the Travel Act in furtherance of violating Section 666. Pet. App. 41a-42a.

The district court denied the motion. Pet. App. 41a-53a. The court observed that the jury had convicted petitioners of standalone federal program bribery, and thus "necessarily * * * found all elements of section 666 federal program bribery to be proven beyond a reasonable doubt." *Id.* at 44a. Although the court of appeals had vacated those convictions for legal error, the district court observed that the convictions were nevertheless a relevant part of the record when "determin[ing] what the jury necessarily decided" for purposes of applying collateral estoppel. *Id.* at 44a n.2.

The district court acknowledged that the Section 666 convictions were difficult to reconcile with the jury's decision to acquit petitioners of conspiring to violate Section 666 and of violating the Travel Act in furtherance of a Section 666 violation. See Pet. App. 47a-49a. But considering the convictions and acquittals together, the court could not conclude that the jury rejected a bribery theory of guilt; rather, the court explained that it was possible that "the jury acted irrationally and the verdict simply was inconsistent." *Id.* at 48a. "Once a jury reaches inconsistent results," the court observed, "'principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful.'" *Id.* at

49a (quoting *United States* v. *Powell*, 469 U.S. 57, 68 (1984)). Thus, because petitioners had failed to meet their burden of showing that the "jury necessarily decided the issue of bribery in [their] favor," the court concluded that "preclusive effect must be denied." *Id.* at 53a.

5. The court of appeals unanimously affirmed, rejecting petitioners' double jeopardy arguments. Pet. App. 1a-40a.

a. The court of appeals first held that the collateral estoppel component of the Double Jeopardy Clause did not bar the government from retrying petitioners on the Section 666 counts. Pet. App. 7a-36a. The court recognized that, under this Court's decision in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), an issue of fact that has necessarily been decided in the defendant's favor in a prior trial may not be relitigated. Pet. App. 8a. To determine whether "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration," the court of appeals noted that it "must 'examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter.'" *Ibid.* (brackets in original) (quoting *Ashe*, 397 U.S. at 444). The court further observed that this Court adopted an "important limitation" on the application of collateral estoppel in *United States* v. *Powell*, *supra*, which held that a jury's acquittal could not invalidate an "inconsistent conviction that was rendered by the same jury in the same proceeding." Pet. App. 10a-11a. "In such a case," the court of appeals explained, "there is no way to know without speculating which of the inconsistent verdicts—the acquittal or the conviction—the jury really meant,"

and so collateral estoppel principles "are impossible to apply." *Id.* at 11a (citation and internal quotation marks omitted).

Applying *Ashe* and *Powell*, the court of appeals rejected petitioners' collateral estoppel argument. The court held that the inconsistent verdicts, which found petitioners guilty of a standalone Section 666 offense but not guilty of offenses that involved a Section 666 violation as a predicate, made it impossible to determine whether the jury necessarily decided that petitioners had not committed bribery. Pet. App. 15a-36a. The court disagreed with petitioners' argument that, because the Section 666 convictions had been vacated for legal error, they could not be considered in determining what the jury actually decided. *Id.* at 15a-20a. *Ashe*, the court noted, "instructed that, for purposes of determining the collateral estoppel effect of acquittals, [courts] must undertake a 'practical' analysis based on the 'record' of the prior proceeding, and with 'an eye to all the circumstances of the proceedings.'" *Id.* at 16a (quoting *Ashe*, 397 U.S. at 444) (citation and internal quotation marks omitted). "Like the acquittals on which [petitioners] rely," the court reasoned, "the convictions in this case are part of what the jury decided at trial." *Ibid.* "Thus, for purposes of deciding whether the jury necessarily decided that the government failed to prove that [petitioners] violated [Section] 666," the court observed, "the fact [that] the jury also convicted [petitioners] of violating [Section] 666 would seem to be of quite obvious relevance, even though the convictions were later vacated." *Id.* at 17a.

The court of appeals also rejected petitioners' effort to analogize vacated convictions to counts on which a jury has hung, which are not a relevant part of

the record for purposes of applying collateral estoppel under this Court's decision in *Yeager* v. *United States*, 557 U.S. 110 (2009). Pet. App. 17a. *Yeager* observed that a hung count "represents not 'a jury's decision[]' but only 'its failure[] to decide.'" *Id.* at 18a (brackets in original) (quoting *Yeager*, 557 U.S. at 122). The court of appeals noted that, under that "line of reasoning in *Yeager*[,] * * * vacated counts should be treated differently from hung counts" because "vacated convictions, unlike hung counts, *are* jury decisions, through which the jury *has* spoken." *Ibid.* The court therefore "conclude[d] that vacated convictions, unlike hung counts, are relevant to the *Ashe* inquiry into what a jury necessarily decided when acquitting on counts related to the vacated convictions." *Id.* at 19a. Because the Section 666 convictions in petitioners' prior trial were inconsistent with the jury's acquittals on the related charges involving Section 666 as a predicate, the court held that petitioners could not "meet their burden of showing that the acquittals * * * collaterally estop the renewed, standalone [Section] 666 prosecutions." *Id.* at 25a.[3]

b. The court of appeals also held that the district court's erroneous line order did not constitute acquittals on the Section 666 charges that would preclude a renewed prosecution on those counts. Pet. App. 37a-39a. The court of appeals acknowledged the "well-established rule that 'the Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is based upon an egregiously erroneous

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[3] Petitioners argued in the court of appeals that the verdicts were not truly inconsistent. Pet. App. 20a. The court rejected that argument, *id.* at 20a-36a, and petitioners do not renew the claim here.

foundation.'" *Id.* at 37a (quoting *Evans* v. *Michigan*, 133 S. Ct. 1069, 1074 (2013)) (citation and internal quotation marks omitted). But the court further observed that "[w]hether an order counts as an 'acquittal' * * * is a question of substance and not of name." *Ibid.*

The court of appeals held that the line order, which was entered *sua sponte* by the district court immediately after the court of appeals' mandate issued, did "not amount to a substantive acquittal by the District Court." Pet. App. 38a. The court of appeals emphasized that nothing in the record indicated that the district court had evaluated the government's evidence in entering the line order; rather, the language of the order suggested that it was "merely intended as a ministerial act to carry out [the court of appeals'] instructions—whatever they may have been—and not an application of law to fact regarding [petitioners'] 'lack of criminal culpability.'" *Ibid.* (quoting *Evans*, 133 S. Ct. at 1077). The court added that the district court had confirmed that the order was simply a transcription error, *ibid.*, and the circumstances surrounding the entry of the order were "consistent with [that] characterization," *id.* at 39a. Accordingly, the court of appeals concluded that the "line order did not constitute an acquittal under the Double Jeopardy Clause." *Ibid.*

ARGUMENT

Petitioners renew their claims (Pet. 14-20, 24-26) that their retrial on standalone Section 666 charges is precluded by the collateral estoppel component of the Double Jeopardy Clause and by the district court's erroneous line order. Petitioners further assert (Pet. 10-13) that the lower courts are divided on the ques-

tion whether a vacated conviction that was rendered in an inconsistent verdict is a relevant part of the record for purposes of applying collateral estoppel. The court of appeals correctly concluded that double jeopardy principles do not bar retrial of petitioners on the Section 666 counts. And although one state high court has declined to consider vacated convictions in a collateral estoppel analysis, the limited division on that issue does not warrant this Court's intervention.

1. Petitioners are incorrect to contend (Pet. 9-24) that the jury's guilty verdicts on the Section 666 charges must be disregarded in determining the collateral estoppel effect of acquittals rendered in the same proceeding. This Court's review of that issue is not warranted.

a. In *Ashe* v. *Swenson*, 397 U.S. 436 (1970), this Court held that the Double Jeopardy Clause "embodie[s]" the doctrine of collateral estoppel, which bars a prosecution that would require the relitigation of ultimate factual issues that were resolved against the government in an earlier prosecution. *Id.* at 445. A jury's acquittal of a defendant on one charge precludes the government from proceeding against him on a second charge, however, only if the jury necessarily found a fact in the defendant's favor that is an essential element of the second charge. See *id.* at 443-445. To determine what a jury has necessarily decided, "courts should 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" *Yeager* v. *United States*, 557 U.S. 110, 119-120 (2009) (quoting

Ashe, 397 U.S. at 444). "[T]he inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Id.* at 120 (quoting *Ashe*, 397 U.S. at 444) (citation omitted). "[T]he rule of collateral estoppel in criminal cases," the Court has observed, must be applied with "realism and rationality." *Ashe*, 397 U.S. at 444.

This Court has emphasized that the application of collateral estoppel is "predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict." *United States* v. *Powell*, 469 U.S. 57, 68 (1984). When a jury reaches inconsistent verdicts, however, that assumption is not accurate, and the Court has accordingly observed that "principles of collateral estoppel * * * are no longer useful." *Ibid.* The problem, the Court has explained, is that "it is unclear whose ox has been gored"—and therefore impossible to determine what the jury necessarily decided. *Id.* at 65. For example, the jury might have been "convinced of guilt" on the count on which it convicted, "and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense." *Ibid.* "[W]here truly inconsistent verdicts have been reached, '[t]he most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt.'" *Id.* at 64-65 (second set of brackets in original) (quoting *Dunn* v. *United States*, 284 U.S. 390, 393 (1932)). Thus, because any determination of which verdict "the jury 'really meant'" would require "pure speculation," *id.* at 66, 68, a defendant cannot carry his burden of establishing that "the issue whose relitigation he

seeks to foreclose was actually decided" in his favor "in the first proceeding." *Dowling* v. *United States*, 493 U.S. 342, 350 (1990).

b. Applying those principles here, the court of appeals correctly held that, because the jury's verdict in the first trial was inconsistent, petitioners cannot invoke collateral estoppel to bar retrial on the vacated Section 666 convictions. Petitioners cannot show that the acquittals in the prior trial necessarily represented a finding that they were not guilty beyond a reasonable doubt of bribery because the jury in fact *convicted* them of a standalone Section 666 violation. Petitioners' argument "necessarily assumes that the acquittal[s] on the predicate offense w[ere] proper—the one[s] the jury 'really meant,'" but, as *Powell* explained, it is "equally possible" that the jury was convinced that petitioners were guilty of bribery in violation of Section 666 and acquitted on the related charges "through mistake, compromise, or lenity." 469 U.S. at 65, 68. In light of the inconsistent verdict, it is impossible to know what the jury actually decided, and "principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict"—therefore "are no longer useful." *Id.* at 68.

Petitioners do not dispute in this Court that the jury verdict in their first trial was inconsistent, but they nevertheless argue (Pet. 15-20) that the court of appeals should have disregarded the convictions on the Section 666 charges because those convictions were vacated on appeal because of legal error. Petitioners maintain that a vacated conviction is a "nonevent" that should not be considered in determining what the jury necessarily decided for purposes of applying collateral

estoppel. Pet. 14 (citation omitted).[4] But that argument overlooks this Court's observation that "reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case." *Burks* v. *United States*, 437 U.S. 1, 15 (1978). A vacated conviction is nullified in the sense that it may not be used to impose legal disabilities, but vacatur does not "erase the fact of the conviction" from the prior proceedings. *United States* v. *Crowell*, 374 F.3d 790, 792 (9th Cir. 2004), cert. denied, 543 U.S. 1070 (2005). A court conducting the "practical" inquiry adopted in *Ashe*, which focuses on "realism and rationality" and requires examination of "all the circumstances of the proceedings," 397 U.S. at 444, therefore need not shut its eyes to a conviction that demonstrates that the jury was not acting rationally when it rendered an inconsistent verdict. In short, petitioners cannot show that the jury's determination that they were guilty beyond a reasonable doubt of a Section 666 offense is irrelevant to discerning whether the jury necessarily decided that petitioners could *not* be found guilty of that offense, even though the Section

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[4] Petitioners deem it significant that a vacated conviction is "deprived of its conclusive effect as collateral estoppel." Pet. 18 (citation omitted). But that is beside the point because the government is not seeking to rely on the jury's convictions on the Section 666 counts to collaterally estop petitioners from proving a fact in future litigation. Rather, petitioners are attempting to rely on the *acquittals* to collaterally estop retrial for a Section 666 offense. The Section 666 convictions are relevant not because they should be given preclusive effect, but because they show the acquittals should *not* be accorded that effect in light of the jury's inconsistent verdict.

666 convictions were subsequently vacated for instructional error.[5]

Petitioners also contend (Pet. 14-17) that the court of appeals' decision is inconsistent with *Yeager*, which held that "the consideration of hung counts has no place in the issue-preclusion analysis." 557 U.S. at 122. *Yeager* reached that conclusion, however, by reasoning that "a jury speaks only through its verdict," such that a "failure to reach a verdict cannot—by negative implication—yield a piece of information that helps put together the trial puzzle." *Id.* at 121. No such negative implication is required when a jury chooses to *convict*, as it did here on the standalone Section 666 offenses. As *Yeager* itself emphasized, hung counts "are not similar to jury verdicts in any relevant sense." *Id.* at 124; see *id.* at 125 ("[T]he fact that a jury hangs is evidence of nothing—other than, of course, that it has failed to decide anything.") Indeed, *Yeager* supports the court of appeals' decision to consider petitioners' convictions in the collateral estoppel analysis, as *Yeager* directed that "courts should

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[5] Petitioners appear to suggest (Pet. 15) that a conviction that is vacated based on instructional error should be treated differently in the collateral estoppel analysis than convictions that are vacated for other legal errors. That claim lacks merit in this context. Here, the jury was properly instructed on a bribery theory, and the court of appeals found that the evidence at trial supported a finding of guilt on that theory. Pet. App. 5a, 90a, 104a. The jury instructions were erroneous not because they incorrectly described the elements of a bribery offense, but because they also permitted conviction based on a gratuity theory. Although petitioners argued below that the Section 666 convictions should be interpreted to rest on the gratuity theory rather than the bribery theory, the court rejected that claim, *id.* at 20a-36a, and petitioners do not renew it here.

scrutinize a jury's decisions, not its failures to decide" in order "[t]o identify what a jury necessarily determined at trial." *Id.* at 122. Petitioners accordingly cannot establish that the jury's decision to convict them of a Section 666 offense is irrelevant based on *Yeager*.[6]

c. Petitioners contend (Pet. 10-13) that lower courts have divided on the question whether a vacated conviction may be considered when applying the collateral estoppel component of the Double Jeopardy Clause. But the limited division petitioners identify does not warrant this Court's review.

As petitioners correctly observe (Pet. 13), all federal courts of appeals to have considered the question, as well as two state high courts, have held in agreement with the First Circuit that a conviction that is vacated based on legal error may be considered in the collateral estoppel inquiry. See *United States* v. *Bruno*, 531 Fed. Appx. 47, 49 (2d Cir. 2013); *United States* v. *Citron*, 853 F.2d 1055, 1058-1060 (2d Cir. 1988); *United States* v. *Price*, 750 F.2d 363, 365-366 (5th Cir.), cert. denied, 473 U.S. 904 (1985); *State* v. *Kelly*, 992 A.2d 776, 778-779, 783, 786 (N.J. 2010); *Evans* v. *United States*, 987 A.2d 1138, 1141-1142 (D.C. 2010),

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[6] Petitioners maintain (Pet. 16) that, under *Yeager*, the finality of the jury's acquittals on charges involving Section 666 as a predicate is "the decisive issue." There is of course no doubt that those acquittals are final and petitioners cannot be retried on those charges. The question here, however, is whether those acquittals necessarily demonstrate that the jury resolved an issue of fact in petitioners' favor that would preclude retrial on the standalone Section 666 charges. The answer to that question is "no," because the acquittals were inconsistent with the Section 666 convictions and the jury's irrational verdict makes "principles of collateral estoppel * * * no longer useful." *Powell*, 469 U.S. at 68.

cert. denied, 562 U.S. 1202 (2011). In reaching that conclusion, the courts have rejected the claim that vacated convictions should be treated the same way as hung counts, so as to come within the analysis adopted in *Yeager*. See *Bruno*, 531 Fed. Appx. at 49; *Citron*, 853 F.2d at 1059; *Price*, 750 F.2d at 365; *Evans*, 987 A.2d at 1142.[7]

The Michigan Supreme Court, in a divided opinion, has reached the opposite conclusion, holding that a vacated conviction cannot "defeat the preclusive effect of an acquittal." *People* v. *Wilson*, 852 N.W.2d 134, 141 (2014). That single outlying decision by a state court does not warrant this Court's intervention—particularly given that the division is shallow and of recent origin.

Petitioners are wrong to contend (Pet. 11-12) that the court of appeals' decision also conflicts with decisions from the New Mexico and Iowa Supreme Courts. Neither decision cited *Yeager* or adopted the principle on which petitioners rely, and one of them turned critically on a holding of state law.

In *State* v. *Montoya*, 306 P.3d 426 (N.M. 2013), a jury convicted the defendant of felony murder but also "effectively acquitted" him of second-degree murder when finding him guilty of the lesser offense of voluntary manslaughter. *Id.* at 429, 432. Both felony murder and second-degree murder included as an element the absence of sufficient provocation for the murder, but the judge had erroneously failed to instruct the

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[7] Although the decisions in *Citron* and *Price* both predate *Yeager*, the Second and Fifth Circuits in those cases decided that vacated counts could be considered in the collateral estoppel analysis at a time when those circuits had already held that hung counts must be disregarded. See Pet. App. 19a n.7.

jury on that element with respect to the felony-murder charge. *Id.* at 429-431. The New Mexico Supreme Court held that the felony murder conviction accordingly must be vacated for instructional error. *Id.* at 431, 440. Because the jury had convicted the defendant of voluntary manslaughter as a lesser-included offense of second-degree murder, however, the jury had already determined that there *was* sufficient provocation for the murder. See *id.* at 430 (observing that "[a] heat-of-passion intentional killing" is punishable as voluntary manslaughter under New Mexico law). The court thus held that collateral estoppel barred retrial on the felony murder charge because a proper instruction would require the jury to find a lack of sufficient provocation, and that issue had already been resolved in the defendant's favor when the jury acquitted him of second-degree murder. *Id.* at 432.

Petitioners erroneously state (Pet. 11) that "the acquittal" in *Montoya* "was by definition inconsistent with the initial, vacated conviction for felony murder." In fact, because the jury had been improperly instructed on the elements of felony murder, that conviction was not inconsistent with the acquittal on second-degree murder: the jurors had found sufficient provocation to foreclose a second-degree murder conviction, but they had not been informed that the lack of sufficient provocation was also an element of felony murder and thus had not rejected such a finding in convicting on felony murder.[8] The analysis in

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[8] Unlike in *Montoya*, the instructional error in this case did not mean that the jury's verdict was consistent under the instructions the jury received. As previously noted, see note 5, *supra*, the jury at petitioners' trial was properly instructed on a bribery theory of

Montoya therefore did not involve an inconsistent verdict. Accordingly, it does not conflict with the court of appeals' decision in this case that a vacated conviction that is inconsistent with an acquittal may be considered in the collateral estoppel analysis.

The Iowa Supreme Court's decision in *State* v. *Halstead*, 791 N.W.2d 805 (2010), likewise is inapposite. The court there, as a matter of *state* law, "decline[d] to follow" this Court's decision in *Powell* and held that "in a case involving conviction of a compound felony when the defendant is acquitted of the underlying predicate crime, the conviction cannot stand." *Id.* at 814. The court reasoned that an inconsistent guilty verdict on a compound offense must essentially be treated as an acquittal. See *id.* at 815 (observing that "a jury verdict involving compound inconsistency insults the basic due process requirement that guilt must be proved beyond a reasonable doubt"). Having held that an inconsistent conviction on a compound offense must be set aside as "inconsistent with the notion of guilt beyond a reasonable doubt," *ibid.*, the court further held that retrial on the compound offense would violate the Double Jeopardy Clause, *id.* at 816. Contrary to petitioners' assertion (Pet. 12 n.1), *Halstead*'s double jeopardy analysis cannot be divorced from its holding that, under state law, an inconsistent guilty verdict on a compound offense should effectively be interpreted as a jury finding that the defendant was not guilty beyond a reasonable doubt.

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guilt and the evidence at trial supported a conviction on that theory. Petitioners accordingly do not argue in their petition for a writ of certiorari that the verdict was consistent.

Halstead accordingly does not conflict with the court of appeals' decision in this case.[9]

d. This Court's review is also unwarranted because the question here—whether a vacated conviction that was inconsistent with an acquittal can be considered for purposes of applying collateral estoppel—arises extremely infrequently. Only three courts of appeals and three state high courts have had an opportunity to consider the question in the 35-plus years since *Ashe* held that the Double Jeopardy Clause embodies a collateral estoppel component. The government is aware of only two occasions other than this one in the last three decades in which this Court has been asked to resolve the question presented here. The Court denied review in both of those cases. See *Evans* v. *United States*, 562 U.S. 1202 (2011) (No. 10-6753); *Price* v. *United States*, 473 U.S. 904 (1985) (No. 84-1444). There is no reason for a different result here.

Petitioners contend (Pet. 22) that the court of appeals' decision in this case "will encourage prosecutors simultaneously to overcharge and to push for far-reaching interpretations of criminal statutes." But petitioners cite no evidence that prosecutors in the Second and Fifth Circuits routinely bring unwarranted charges or urge unwarranted interpretations of criminal statutes, even though those courts adopted

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[9] Tellingly, the court of appeals below did not consider *Montoya* and *Halstead* relevant to the question whether a vacated conviction that was inconsistent with an acquittal may be considered for purposes of applying collateral estoppel. See Pet. App. 19a-20a (citing only the Michigan Supreme Court's decision as being in conflict with the court's analysis). And while petitioners cite (Pet. 2) *Montoya* and *Halstead* as evidence that the lower courts are "hopelessly divided" on the status of vacated counts in light of *Yeager*, neither of those decisions cites or discusses *Yeager*.

the rule more than 25 years ago that vacated convictions may be considered in the collateral estoppel analysis. Contrary to petitioners' suggestion, prosecutors in those jurisdictions and throughout the country generally offer reasonable interpretations of criminal statutes in reasonably compact indictments. See, *e.g.*, *Bates* v. *United States*, 522 U.S. 23, 32-33 (1997) (unanimously upholding the government's interpretation of 20 U.S.C. 1097(a)). Petitioners cite (Pet. 21) a handful of cases from the last 16 years that they contend involved "expansive" theories of criminal statutes offered by the government, but that is hardly a significant statistical showing given that about 60,000 criminal cases are filed in federal district court each year. See United States Courts, *Statistical Tables for the Federal Judiciary-June 2015, Criminal Cases Filed, Terminated, and Pending (Including Transfers), Tbl. D. Cases* (June 30, 2015), http://www.uscourts.gov/statistics-reports/statistical-tables-federal-judiciary-june-2015. Petitioners' concern about overcharging provides no basis for this Court's review.

2. Petitioners are also wrong to contend (Pet. 24-26) that the district court's erroneous docket entry line order constituted an acquittal that prevents retrial on the Section 666 charges. Review of that fact-bound claim is not warranted.

a. The court of appeals correctly concluded that the district court's transcription error in its line order was not an acquittal for double jeopardy purposes. This Court has repeatedly emphasized that "what constitutes an 'acquittal' is not to be controlled by the form of the judge's action," *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977), but rather turns on whether the "judicial determination[] * * *

go[es] to 'the criminal defendant's lack of criminal culpability,'" *Evans* v. *Michigan*, 133 S. Ct. 1069, 1077 (2013) (quoting *United States* v. *Scott*, 437 U.S. 82, 98 (1978)). The particular language used is not determinative; the word "acquittal," the Court has explained, "has no talismanic quality for purposes of the Double Jeopardy Clause." *Serfass* v. *United States*, 420 U.S. 377, 392 (1975). Thus, for example, "[i]f a trial court were to announce, midtrial, 'The defendant shall be acquitted because he was prejudiced by preindictment delay,' the Double Jeopardy Clause would pose no barrier to reprosecution, notwithstanding the 'acquittal' label." *Evans*, 133 S. Ct. at 1078. Rather, double jeopardy protections come into play only if the court has made a substantive ruling "that the prosecution's proof is insufficient to establish criminal liability for an offense"—for example, "'a ruling by the court that the evidence is insufficient to convict,' a 'factual finding [that] necessarily establish[es] the criminal defendant's lack of criminal culpability,' and any other 'rulin[g] which relate[s] to the ultimate question of guilt or innocence.'" *Id.* at 1075 (brackets in original) (quoting *Scott*, 437 U.S. at 91, 98 & n.11); see Pet. App. 37a ("Whether an order counts as an 'acquittal' * * * is a question of substance and not of name.").

The erroneous line order in this case did not reflect a resolution of the ultimate question of guilt or innocence, and it therefore does not qualify as an acquittal. The district court did not purport to evaluate the government's evidence or make any kind of determination of petitioners' criminal culpability; rather, the order was clearly "intended as a ministerial act to carry out th[e] [court of appeals'] instructions" in the

first appeal. Pet. App. 38a.[10] Notably, the district court expressly denied having engaged in any substantive analysis, instead explaining that the use of the word "acquittal" in the line order was "an error of transcription, not an error of law." *Id.* at 56a; see *id.* at 38a-39a; cf. *United States* v. *Weinstein*, 452 F.2d 704, 714 (2d Cir. 1971) (declining to "hold that the order here in question was a judgment of acquittal, which the judge repeatedly said he did not intend to enter"), cert. denied, 406 U.S. 917 (1972).[11] Moreover,

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[10] Indeed, the district court would have had no authority to make a substantive determination about the government's evidence in light of the court of appeals' mandate. In vacating the Section 666 convictions for legal error, the First Circuit found that the government had presented sufficient evidence to support a bribery theory, and it accordingly remanded the case for possible retrial on that theory. See Pet. App. 90a, 108a, 130a. The district court was presumably aware that it could not foreclose such a retrial by *sua sponte* granting an acquittal before the government presented any evidence in a second trial. See, *e.g.*, *United States* v. *Bruno*, 661 F.3d 733, 743 (2d Cir. 2011) (remand for retrial "allow[s] the government the opportunity to muster evidence sufficient to satisfy" a newly announced standard); *United States* v. *Wittig*, 575 F.3d 1085, 1102 (10th Cir. 2009) ("[Q]uestions about the sufficiency of the government's proof must await the new trial's results."). Thus, as the district court itself explained, the line order was "merely intended to transfer and apply the First Circuit Court of Appeals' mandate to the trial docket, and not to issue an acquittal *sua sponte* without any kind of analysis." Pet. App. 57a.

[11] Petitioners contend (Pet. 25-26) that the district court's line order "reflected [the court's] reading of the substantive determination in the first appeal." But the court disavowed that interpretation, instead characterizing the erroneous language as an "oversight." Pet. App. 56a. The court explained that it had meant to "implement the [court of appeals'] mandate," which had "unambiguously" ordered that the Section 666 convictions be vacated, not reversed based on a judgment of acquittal. *Id.* at 57a. In other

the "circumstances of the order—which came immediately after th[e] [court of appeals'] mandate, and unprompted by any party and thus not in response to an acquittal motion—[we]re consistent with the District Court's characterization of its line order." Pet. App. 39a. The court of appeals accordingly correctly held that "the line order does not amount to a substantive acquittal by the District Court under *Evans* and *Martin Linen*." *Id.* at 38a.[12]

b. Although petitioners refer (Pet. 26) to the need to provide "guidance for future cases," they point to no conflict among the lower courts on the question presented here—whether a line order erroneously purporting to memorialize a court of appeals' decision constitutes an irreversible acquittal simply because it mistakenly contained the word "acquittal." Petitioners' highly factbound argument on that issue lacks merit and does not warrant this Court's review.

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words, the district court did not attempt to put a substantive gloss on the court of appeals' decision, but merely committed a transcription error as it "transfer[ed]" the court of appeals' "mandate to the trial docket." *Ibid.*

[12] Petitioners contend (Pet. 24-26) that the court of appeals' analysis conflicts with *Evans*, which rejected the argument that an acquittal can occur "only if an actual element of the offense is resolved." 133 S. Ct. at 1077. But the facts of this case have nothing to do with that aspect of *Evans*. The court of appeals did not focus on whether the district court had failed to resolve a factual element of the offense, but rather found that no acquittal had occurred because "the line order was merely intended as a ministerial act" and "not an application of law to fact regarding [petitioners'] 'lack of criminal culpability.'" Pet. App. 38a (quoting *Evans*, 133 S. Ct. at 1077).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 15-537

IN THE

Supreme Court of the United States

JUAN BRAVO-FERNANDEZ AND
HECTOR MARTÍNEZ-MALDONADO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY	1
I. This Court Should Decide Whether a Vacated Conviction Deprives an Acquittal of its Collateral Estoppel Effect	2
II. This Court Should Decide Whether a District Court Can Retract a Judgment of Acquittal	10
CONCLUSION	12

TABLE OF AUTHORITIES

CASES Page(s)

Abney v. United States,
431 U.S. 651 (1977) 1

Ashe v. Swenson,
397 U.S. 436 (1970) 4

Evans v. Michigan,
133 S. Ct. 1069 (2013) 10

Skilling v. United States,
561 U.S. 358 (2010) 10

Smalis v. Pennsylvania,
476 U.S. 140 (1986) 5

State v. Halstead,
791 N.W.2d 805 (Iowa 2010) 5, 6

State v. Montoya,
306 P.3d 426 (N.M. 2013) 4, 5

United States v. Gonzalez-Lopez,
548 U.S. 140 (2006) 3

United States v. Newman,
773 F.3d 438 (2d Cir. 2014) 10

United States v. Ressam,
553 U.S. 272 (2008) 3

United States v. Wells,
519 U.S. 482 (1997) 3

Yeager v. United States,
557 U.S. 110 (2009) 1

STATUTES

18 U.S.C. § 666 ..... 5, 7

OTHER AUTHORITIES

Sup. Ct. R. 10 4

REPLY

This case presents a perfect vehicle to resolve an acknowledged split on an important and recurring question of constitutional law. The Government concedes that the lower courts are split on the principal question presented, whether a vacated conviction deprives an acquittal of its preclusive effect under the Double Jeopardy Clause. Opp. 18. That question is squarely presented and outcome determinative, and the Government identifies no barrier to this Court's review. Pet. 1, 24.

The Government does not dispute that this question is of immense significance to criminal defendants. The First Circuit emphasized the issue's "importan[ce]" in the very first sentence of its opinion, App. 2a, then stayed its mandate pending resolution of this petition, App. 136a. This Court termed "vitally important" the question whether a hung count deprives an acquittal of its preclusive effect. *Yeager v. United States*, 557 U.S. 110, 117 (2009). The parallel question for vacated convictions is no less so. There are few issues of greater significance than whether a criminal defendant who has been tried once must be "forced to endure a [second] trial that the Double Jeopardy Clause was designed to prohibit." *Abney v. United States*, 431 U.S. 651, 662 (1977).

The opposition's makeweight objections are no reason to deny review. The Government quibbles about whether the split is 5-1 or 5-3 and bizarrely accuses petitioners of failing to make a "significant statistical" showing that the First Circuit's rule encourages prosecutorial overreach. Opp. 19, 23. But a 5-1 split is still a split. And if the decision below and others like it contribute to even one instance of excessive charging, that is one too many.

The petition presents a recurring question of constitutional criminal procedure of the sort this Court routinely takes up when the lower courts are split. There is no need for further percolation, and no reason to leave the lower courts divided. If the Government had lost below, it would have sought certiorari. The rules should not change when the United States is on the other side of the "v."

I. This Court Should Decide Whether a Vacated Conviction Deprives an Acquittal of its Collateral Estoppel Effect

The Government admits that the First Circuit's decision widens a direct conflict among lower courts on a question of constitutional law. That admission alone demonstrates the need for this Court's review. But there is more. The decision below is irreconcilable with this Court's decision in Yeager. And the question presented has immense significance, for not only individual defendants facing retrial, but also the criminal justice system writ large.

1. The Government argues (at 18-22) that the split in the lower courts is 5-1 rather than 5-3. This is both incorrect and irrelevant. This Court's review would be equally warranted if the split were 5-1. Just ask the Government, which has sought and obtained certiorari at least *23 times* in the last two decades in criminal cases in which only one federal appellate court or state high court adopted a particular view of the law.[1] Such

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[1] *See* petitions in *United States v. Bryant*, No. 14-420, 2015 WL 5817972; *United States v. Apel*, No. 12-1038, 2013 WL 682820; *United States v. Jones*, No. 10-1259, 2011 WL 1462758; *United States v. Tinklenberg*, No. 09-1498, 2010 WL 2300574; *United States v. Williams*, No 09-466, 2009 WL 3389926; *United States v. Marcus*, No. 08-1341, 2009 WL 1179321; *United States v.*

splits were not too "shallow," Opp. 19, for example, when the Government successfully sought certiorari in *United States v. Ressam*, 553 U.S. 272 (2008), urging: "This 2-1 conflict among published court of appeals decisions merits this Court's review."[2] Ditto in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), where the Eighth Circuit joined other circuits in ruling that denial of counsel of choice is structural error, but the Government successfully sought certiorari because one circuit disagreed.[3] And the same is true in *United States v. Wells*, 519 U.S. 482 (1997), where the decision joined nine other circuits in imposing a materiality requirement on a federal criminal statute, but a single circuit disagreed and took the Government's side.[4]

Comstock, No. 08-1224, 2009 WL 1541676; *United States v. Hayes*, No. 07-608, 2007 WL 3322292; *United States v. Ressam*, No. 07-455, 2007 WL 2898699; *United States v. Santos*, No. 06-1005, 2007 WL 173651; *United States v. Rodriguez*, No. 06-1646, 2007 WL 1684900; *United States v. Gonzalez-Lopez*, No. 05-352, 2005 WL 2275408; *United States v. Grubbs*, No. 04-1414, 2005 WL 936477; *United States v. Smith*, No. 04-1390, 2005 WL 883803; *United States v. Maxwell*, No. 04-1382, 2005 WL 883796; *United States v. Patane*, No. 02-1183, 2003 WL 21251626; *United States v. Bean*, No. 01-704, 2001 WL 34092098; *United States v. Drayton*, No. 01-631, 2001 WL 34092095; *United States v. Knights*, No. 00-1260, 2000 WL 33979551; *United States v. Rodriguez-Moreno*, No. 97-1139, 1998 WL 34081104; *United States v. Hyde*, No. 96-667, 1996 WL 33414097; *United States v. Watts*, No. 95-1906, 1996 WL 33413781; *United States v. Wells*, No. 95-1228, 1996 WL 33413829.

[2] Petition for Certiorari, *Ressam*, No. 07-455, 2007 WL 2898699, at *13.

[3] Petition for Certiorari, *Gonzalez-Lopez*, No. 05-352, 2005 WL 2275408, at *16-18 & n.6.

[4] Petition for Certiorari, *Wells*, No. 95-1228, 1996 WL 33413829, at *12-13.

The Government suggests that state supreme court decisions are unworthy of this Court's attention. Opp. 19. This Court's Rule 10 is to the contrary: conflicts between "a United States court of appeals" and "a decision by a state court of last resort" present a "compelling" reason to grant certiorari. Sup. Ct. R. 10(a). So is *United States v. Knights*, where the Government successfully sought certiorari from a Ninth Circuit decision requiring consent for searches of probationers; the government argued that one state supreme court disagreed.[5]

Regardless, whether the conflict is 5-3 or 5-1, numerous appellate courts have addressed the issue. There is no reason to think any lower court will change its mind. The Government does not identify any reason why additional percolation would assist this Court. There is no reason to let the conflict fester.

And the split is 5-3. Like the Michigan Supreme Court, the high courts of Iowa and New Mexico would have sided with petitioners. The Government hypothesizes a rationale for *State v. Montoya*, 306 P.3d 426 (N.M. 2013), that is entirely absent from the decision itself. Because the court instructed the jury that absence of provocation was an element of the offense of acquittal but not the offense of conviction, the Government argues that the case "did not involve an inconsistent verdict." Opp. 21. But the New Mexico Supreme Court performed no such analysis in holding that *Ashe v. Swenson*, 397 U.S. 436, 446 (1970), prohibited the defendant's retrial for felony murder. The court did not attempt to reconcile the two verdicts. Rather the court reasoned only that a fact necessarily

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[5] Petition for Certiorari, *United States v. Knights*, No. 00-1260, 2000 WL 33979551, at *20.

determined by the acquittal—absence of provocation—was an essential element of the vacated conviction. 306 P.3d at 432. The same is true here—in acquitting petitioners of conspiring and traveling to violate § 666, the jury necessarily determined that petitioners did not commit bribery. The New Mexico Supreme Court thought the improper instruction on the vacated conviction relevant to its decision to vacate that conviction, of course, but did not focus on the improper instruction as part of the *Ashe* analysis.

The Iowa Supreme Court's decision in *State v. Halstead*, 791 N.W.2d 805 (Iowa 2010), likewise conflicts with the decision below. Pet. 11-12. The Government does not dispute that *Halstead* held that the Double Jeopardy Clause collateral estoppel principle precluded retrial on a vacated conviction because that charge depended on a fact necessarily determined by a simultaneously-rendered acquittal. 791 N.W.2d at 816. Instead the Government asserts that *Halstead*'s collateral estoppel analysis "cannot be divorced from its holding that, under state law," a conviction must be vacated if it is inconsistent with an acquittal. Opp. 21.

There is a reason the Government offers no explanation for that assertion. It is plainly untrue. *Halstead* analyzed the state and federal questions separately: "Having determined that the compound conviction in this case cannot stand, we next confront whether the defendant may be retried on remand." 791 N.W.2d at 816. The court's analysis of that second, federal question relied exclusively on two decisions of this Court, *Ashe* and *Smalis v. Pennsylvania*, 476 U.S. 140 (1986). Nowhere did *Halstead* suggest that that result was compelled by its initial decision to vacate the conviction under state

law. Also, as petitioners noted (at 12 n.1), the Alaska Supreme Court vacates inconsistent convictions under state law but holds that federal law *permits* retrial, decisively undermining the notion that *Halstead*'s federal collateral estoppel holding "cannot be divorced" from its state law holding. Indeed, *Halstead* discussed the Alaska case at length, adopting its state law holding but rejecting its federal holding. 791 N.W.2d at 811, 815-16. The Government ignores this point.

Finally, there is nothing "[t]elling[]," Opp. 22 n.9, about the First Circuit's failure to address *Montoya* and *Halstead*. It is unsurprising that the court did not address two cases neither party raised below.

In Michigan, New Mexico, and Iowa, petitioners would be secure from retrial. The protections of the Double Jeopardy Clause cannot depend on the identity of the prosecutor or the location of the prosecution. This Court should resolve the conflict.

2. On the merits, the Government regurgitates arguments that *Yeager* rejected. Opp. 13-18. The vacated convictions here "demonstrate[] that the jury was not acting rationally," Opp. 16, to the exact same extent as the hung counts in *Yeager*, which nonetheless do not factor into the collateral estoppel analysis. And while the First Circuit's 2013 decision vacating petitioners' convictions for instructional error did "'not constitute a decision to the effect that the government has failed to prove its case,'" Opp. 16, that is entirely beside the point. What *did* constitute a decision to the effect that the government has failed to prove its case was the jury's decision to *acquit* petitioners of conspiring and traveling to commit bribery. The Government does not dispute that those acquittals standing alone necessarily rested on a finding that

petitioners did not commit federal program bribery. Pet. 7, 22.

To be clear, the jury made no "determination that [petitioners] were guilty beyond a reasonable doubt of a Section 666 offense," Opp. 16, and no "decision to convict [petitioners] of a Section 666 offense," Opp. 18. The Government's suggestion that it did is inexplicable. Section 666 proscribes only bribery, and the jury unquestionably has never found that petitioners bribed anyone. All the vacated convictions show is that the jury found beyond a reasonable doubt that petitioners engaged in certain conduct that *was not a crime*. To be sure, the court of appeals declined to direct an acquittal on sufficiency grounds, and held that it could not be sure the jury had convicted based on the improper gratuity theory—because the jury *might* have thought petitioners committed a crime. App. 20a-36a. Contrary to the Government's suggestion (at 17 n.5), however, neither of those holdings is equivalent to a jury finding that petitioners were guilty beyond a reasonable doubt of conduct that is a crime.

The Government likewise fails to confront the significant tension between the decision below and a host of decisions from this Court and others declining to give any legal effect to vacated convictions. Pet. 17-19. The Government agrees that vacated convictions "may not be used to impose legal disabilities," Opp. 16; *see* Pet. 19-20, but does not explain how its position obeys that principle. And while the government does not argue that the vacated convictions themselves "collaterally estop petitioners from proving a fact" at trial, Opp. 16 n.4, the government does argue that the

facts supposedly determined by the vacated convictions preclude petitioners from exercising a constitutional right that would otherwise prevent retrial.

3. The Government does not deny that whether a vacated conviction deprives an acquittal of its otherwise preclusive effect is an important federal question. Pet. 1-2, 20-24. The First Circuit declared that "[t]his appeal raises important ... issues," App. 2a, and stayed its mandate pending this petition, App. 136a. Few questions of constitutional law are more significant than whether a criminal defendant must stand trial in the first place.

The Government claims that the issue arises "extremely infrequently," stating that only three courts of appeals and three state high courts have decided the question. Opp. 22. First, that is actually a lot of decisions, and this Court regularly takes up issues that have produced many fewer reported decisions. Second, the Government undercounts. Whether or not the Iowa and New Mexico Supreme Court decisions are distinguishable, they clearly faced the factual scenario present here, and the rule petitioners advance would have precluded retrial in those cases. And the Government ignores numerous other state and federal cases in which the issue has arisen. Pet. 12 n.2, 13 n.3, 23 n.5. Third, the question presented is arising with even greater frequency since *Yeager*. In the last 6 years, the First and Second Circuits and the courts of last resort in D.C., New Jersey, Iowa, New Mexico, and Michigan have decided the question. Pet. 10-13. There can be no serious dispute that many more cases will follow.

The Government is "aware of only two occasions other than this one in the last three decades in which this Court has been asked to resolve the question

presented here." Opp. 22. The Government said the same in *Yeager*. Brief for the United States in Opposition at 21, *Yeager*, No. 08-67, 2008 WL 5692872, at *21 ("We are aware of only two occasions other than this one in the last 20 years in which this Court has been asked to resolve the tension among the courts of appeals on the issue."). This is a curious, backwards argument. When this Court frequently denies petitions presenting a question, the Government argues that fact counts *against* certiorari.

Whether an unlawful conviction deprives a lawful acquittal of its preclusive effect is significant not only for individual criminal defendants facing retrial. The question presented has substantial downstream effects on prosecutorial charging decisions, reinforcing the need for review. Pet. 20-23. The First Circuit's rule encourages overcharging and expansive interpretations of criminal statutes by eliminating consequences for prosecutors. Pet. 22. The Government responds by accusing petitioners of failing to offer a "significant statistical showing" about the problem of excessive charging. Opp. 23. What number does the government think would be enough? Even one abusive indictment is "significant."

The Government suggests that four Supreme Court cases rejecting expansive interpretations of criminal statutes (Pet. 21) are statistically "[in]significant" in light of the 60,000 federal indictments each year. But one Supreme Court case obviously does not mean there was only one indictment under each statute. Those decisions involve Sarbanes-Oxley, the honest services fraud statute, and the federal mail fraud statute. Pet. 21. These are some of the most used (and over-used) statutes on the books.

The Government finally argues that "petitioners cite no evidence that prosecutors in the Second and Fifth Circuits routinely bring unwarranted charges or urge unwarranted interpretations of criminal statutes." Opp. 22. Petitioners are unaware of any comparative statistics on overcharging by circuit or how one could perform such an analysis. But there is plenty of evidence of overcharging within both circuits. *E.g.*, *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014) (rejecting government's theory of securities fraud); *Skilling v. United States*, 561 U.S. 358 (2010) (overturning Fifth Circuit and rejecting government's theory of honest services fraud). And this Court and lower courts have repeatedly recognized that declining to afford collateral estoppel effect to acquittals creates a "potential for unfair and abusive reprosecutions." *Ashe*, 397 U.S. at 445 n.10; *see also* Pet. 20-23.

II. This Court Should Decide Whether a District Court Can Retract a Judgment of Acquittal

The First Circuit permitted the district court to retract its judgment acquitting petitioners on a ground that is squarely contrary to *Evans v. Michigan*, 133 S. Ct. 1069 (2013). The court held: "The *determinative question* is thus 'whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.'" App. 37a-38a (emphasis added) (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)). The Government does not dispute that Evans rejected precisely that test. Pet. 25. Instead the Government contends that "the facts of this case have nothing to do with that aspect of *Evans*," and that the "court of appeals did not focus on whether the district court had failed to resolve a

factual element of the offense." Opp. 26 n.12. These arguments are hard to square with the First Circuit's holding that precisely that inquiry was "determinative."

The Government does not dispute that the First Circuit's 2013 decision constituted a "substantive" resolution of petitioners' ultimate guilt or innocence. Pet. 25-26. Nor does the Government explain how a district court order interpreting an appellate court's substantive decision qualifies as "procedural" rather than "substantive" under any precedent of this Court —the dichotomy that is, in fact, determinative. Pet. 25. The government argues that the district court's *ex post* characterization of its ruling as an "oversight" should control, Opp. 25 n.11, but such an exception would swallow the rule. Defendants who have been acquitted should not lose the protection of that acquittal because the court later decides it made a mistake.

Nor is the second question presented "factbound." Opp. 26. Whether an acquittal based on a substantive determination by the court of appeals can be withdrawn is a question of law. The government notably fails to identify a single decision from this Court supporting its argument that such orders fall on the procedural end of the spectrum. Opp. 23-26. This Court should grant review of both questions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 15-537

IN THE

Supreme Court of the United States

JUAN BRAVO-FERNANDEZ AND
HECTOR MARTÍNEZ-MALDONADO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 23, 2015
CERTIORARI GRANTED MARCH 28, 2016

TABLE OF CONTENTS

Page

Relevant Docket Entries

United States District Court for the District of Puerto Rico, No. 3:10-CR-00232 1

United States Court of Appeals for the First Circuit, No. 12-1289 16

United States Court of Appeals for the First Circuit, No. 12-1290 18

United States Court of Appeals for the First Circuit, No. 14-1089 20

United States Court of Appeals for the First Circuit, No. 14-1091 23

Indictment, filed June 22, 2010 26

Jury Instructions, filed March 4, 2011 53

Jury Verdict, filed March 7, 2011 86

NOTICE

The following opinion and orders have been omitted in printing this joint appendix because they appear on the following pages of the appendix to the Petition for Certiorari:

Opinion of the United States Court of Appeals for the First Circuit, Decided June 15, 2015 ..... 1a

Opinion of the United States District Court for the District of Puerto Rico, Decided December 23, 2013 ..... 41a

Order of the United States District Court for the District of Puerto Rico, Dated November 8, 2013 ..... 54a

TABLE OF CONTENTS—Continued

Page

Opinion of the United States Court of Appeals for the First Circuit, Decided June 26, 2013 ..... 59a

Order of the United States Court of Appeals for the First Circuit, Dated July 27, 2015 (Denying Rehearing En Banc) 134a

Order of the United States Court of Appeals for the First Circuit Dated August 6, 2015 (Staying the Mandate) 136a

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Docket No.: 3:10-cr-00232

UNITED STATES OF AMERICA

v.

BRAVO-FERNANDEZ, ET AL.

RELEVANT DOCKET ENTRIES

DATE	NO.	DOCKET TEXT
6/22/2010	1	INDICTMENT as to Juan Bravo-Fernandez (1) counts 1, 2, 4, Hector Martinez-Maldonado (2) counts 1, 3, 5, 6.
2/14/2011	344	Minute Entry for proceedings held before Judge Francisco A. Besosa:Jury Trial as to Juan Bravo-Fernandez, Hector Martinez-Maldonado held on 2/14/2011.
2/15/2011	350	Minute Entry for proceedings held before Judge Francisco A. Besosa:Further Jury Trial (2nd day) as to Juan Bravo-Fernandez, Hector Martinez-Maldonado held on 2/15/2011.

DATE	NO.	DOCKET TEXT
2/16/2011	358	Minute Entry for proceedings held before Judge Francisco A. Besosa: Further Jury Trial (3rd day) as to Juan Bravo-Fernandez and Hector Martinez-Maldonado held on 2/16/2011.
2/17/2011	361	Minute Entry for proceedings held before Judge Francisco A. Besosa: Further Jury Trial (4th day) as to Juan Bravo-Fernandez and Hector Martinez-Maldonado held on 2/17/2011.
2/18/2011	367	Minute Entry for proceedings held before Judge Francisco A. Besosa: Further Jury Trial (5th day) as to Juan Bravo-Fernandez and Hector Martinez-Maldonado held on 2/18/2011.
2/22/2011	373	Minute Entry for proceedings held before Judge Francisco A. Besosa: Further Jury Trial (6th day) as to Juan Bravo-Fernandez and Hector Martinez-Maldonado held on 2/22/2011.
2/23/2011	376	Minute Entry for proceedings held before Judge Francisco A. Besosa: Further Jury Trial (7th day) as to Juan Bravo-

DATE	NO.	DOCKET TEXT
		Fernandez and Hector Martinez-Maldonado held on 2/23/2011.
2/25/2011	400	Minute Entry for proceedings held before Judge Francisco A. Besosa: Further Jury Trial (8th day) as to Juan Bravo-Fernandez and Hector Martinez-Maldonado held on 2/25/2011.
2/28/2011	406	Minute Entry for proceedings held before Judge Francisco A. Besosa: Further Jury Trial (9th day) as to Juan Bravo-Fernandez and Hector Martinez-Maldonado held on 2/28/2011.
3/1/2011	408	Minute Entry for proceedings held before Judge Francisco A. Besosa: Further Jury Trial (10th day) as to Juan Bravo-Fernandez and Hector Martinez-Maldonado held on 3/1/2011.
3/2/2011	414	Minute Entry for proceedings held before Judge Francisco A. Besosa: Further Jury Trial (11th day) as to Juan Bravo-Fernandez and Hector Martinez-Maldonado held on 3/2/2011.

DATE	NO.	DOCKET TEXT
		Defendants Bravo and Martinez rested.
3/4/2011	432	Minute Entry for proceedings held before Judge Francisco A. Besosa: Further Jury Trial (12th day) as to Juan Bravo-Fernandez and Hector Martinez-Maldonado held on 3/4/2011.
3/4/2011	433	Final Jury Instructions as to Juan Bravo-Fernandez and Hector Martinez-Maldonado.
3/7/2011	436	Minute Entry for proceedings held before Judge Francisco A. Besosa: Further Jury Trial (13th day) as to Juan Bravo-Fernandez and Hector Martinez-Maldonado held on 3/7/2011.
3/7/2011	438	JURY VERDICT as to Juan Bravo-Fernandez (1) and Hector Martinez-Maldonado (2).
12/12/2011	588	OPINION AND ORDER re 449 Motion under Rule 29 as to Juan Bravo-Fernandez (1) and Hector Martinez-Maldonado (2); and re 450 Motion for Acquittal as to Hector Martinez-Maldonado (2). The Court GRANTS defendant Bravo's Rule 29

DATE	NO.	DOCKET TEXT
		motion for judgment of acquittal as to Count Two, DENIES defendant Bravo's Rule 29 motion for judgment as to Counts One and Four [Docket No. 449], and DENIES defendant Martinez's Rule 29 motion for judgment of acquittal as to Count Five [Docket No. 450]. Signed by Judge Francisco A. Besosa on 12/12/2011.
2/29/2012	612	Minute Entry for proceedi. gs held before Judge Francisco A. Besosa: 1st day of Sentencing Hearing as to Juan Bravo-Fernandez, Hector Martinez-Maldonado held on 2/29/2012. Further Sentencing Hearing set for 3/01/2012 at 9:00 AM before Judge Francisco A. Besosa in Courtroom #2.
3/1/2012	614	Minute for proceedings held before Judge Francisco A. Besosa: Further Sentencing held on 3/1/2012 for Hector Martinez-Maldonado (2), Count(s) 1, Dismissed by order of the Court on 8/30/2011.; Count(s) 3, 6, Dismissed after not guilty verdict on 3/7/2011.; Count(s) 5, Impr for 48 months. Fine in

DATE	NO.	DOCKET TEXT
		the amount of $17,500.00. SRT of 3 yrs. SMA of $100.00. Denying 607 Motion for bail pending appeal as to Hector Martinez-Maldonado (2). Defendant to surrender to the USM today at 4:00 P.M.
3/1/2012	615	Minute for proceedings held before Judge Francisco A. Besosa: Further Sentencing held on 3/1/2012 for Juan Bravo-Fernandez (1), Count(s) 1, 4, Impr for 48 months as to count 1 and 48 months as to count 4. Said terms to be served concurrently with each other. SRT of 3 yrs. SMA of $200.00. Count(s) 2, Dismissed by order of the Court on 12/12/2011. Granting 604 Motion for bail pending appeal as to Juan Bravo Fernandez (1).
3/1/2012	616	JUDGMENT as to Hector Martinez-Maldonado (2), Count(s) 1, Dismissed by order of the Court on 8/30/2011.; Count(s) 3, 6, Dismissed after not guilty verdict on 3/7/2011.; Count(s) 5, Impr for 48 months. Fine in the amount of $17,500.00. SRT of 3 yrs. SMA of $100.00. Signed by Judge

DATE	NO.	DOCKET TEXT
		Francisco A. Besosa on 3/1/2012
3/1/2012	617	AMENDED Minute for proceedings held before Judge Francisco A. Besosa: Amending 615. Further Sentencing held on 3/1/2012 for Juan Bravo-Fernandez (1), Count(s) 1, 4, Impr for 48 months as to count 1 and 48 months as to count 4. Said terms to be served concurrently with each other. Fine in the amount of $175,000.00. Payment of fine stayed pending appeal. SRT of 3 yrs. SMA of $200.00. Count(s) 2, Dismissed by order of the Court on 12/12/2011. Denying 604 Motion for bail pending appeal as to Juan Bravo-Fernandez (1). Voluntary surrender granted until 4/16/2012.
3/1/2012	618	JUDGMENT as to Juan Bravo-Fernandez (1), Count(s) 1 AND 4: Impr for 48 months as to count 1 and 48 months as to count 4. Said terms to be served concurrently with each other. Fine in the amount of $175,000.00. Payment of fine stayed pending appeal. SRT of 3 yrs. SMA of $200.00.

DATE	NO.	DOCKET TEXT
		Voluntary surrender granted until 4/16/2012.; Count(s) 2, Dismissed by order of the Court on 12/12/2011. Signed by Judge Francisco A. Besosa on 3/1/2012.
3/2/2012	620	NOTICE OF APPEAL by Juan Bravo-Fernandez as to 618 Judgment
3/2/2012	621	NOTICE OF APPEAL by Hector Martinez-Maldonado as to 616 Judgment
1/2/2013	634	MOTION for Release from Custody by Juan Bravo-Fernandez, Hector Martinez-Maldonado. Suggestions in opposition/response due by 1/18/2013
1/3/2013	635	Certified Copy of Order from USCA as to Juan Bravo-Fernandez, Hector Martinez-Maldonado entered on 1/2/2013 re 620 Notice of Appeal - Final Judgment, 621 Notice of Appeal - Final Judgment. Defendants' Renewed Motion for Bail Pending Appeal is granted. This case is remanded to the district court so that appropriate conditions of release can be set.

DATE	NO.	DOCKET TEXT
1/3/2013	636	ORDER re 634 Motion for Release from Custody and 635 USCA Order as to Juan Bravo-Fernandez 1 and Hector Martinez-Maldonado 2 The Court orders that defendants Juan Bravo-Fernandez and Hector Martinez-Maldonado be released forthwith and immediately from their current places of confinement, subject to several conditions. Signed by Judge Francisco A. Besosa on 01/03/2013.
6/27/2013	638	Printed Opinion from USCA as to Juan Bravo-Fernandez, Hector Martinez-Maldonado entered on 06/26/13 Re: 621 Notice of Appeal - Final Judgment, filed by Hector Martinez-Maldonado, 620 Notice of Appeal - Final Judgment, filed by Juan Bravo-Fernandez.
6/27/2013	639	JUDGMENT of USCA (certified copy) as to Juan Bravo-Fernandez re 620 Notice of Appeal - Final Judgment; "Juan Bravo Fernandez's conspiracy conviction is REVERSED, and the district court is directed to enter a judgment of acquittal. Juan

DATE	NO.	DOCKET TEXT
		Bravo Fernandez's 18 U.S.C. Sec. 666 conviction is VACATED, and the matter is REMANDED for further proceedings consistent with the opinion issued this day."
6/27/2013	640	JUDGMENT of USCA (certified copy) as to Hector Martinez-Maldonado re 621 Notice of Appeal - Final Judgment; "The district court's order declaring a mistrial as to Hector Martinez Maldonado's conspiracy count is REVERSED, and the district court is directed to enter a judgment of acquittal. Hector Martinez Maldonado's 18 U.S.C. Sec. 666 conviction is VACATED, and the matter is REMANDED to the district court for further proceedings consistent with the opinion issued this day."
10/23/2013	641	MANDATE of USCA (certified copy) as to Juan Bravo-Fernandez, Hector Martinez-Maldonado re 621 Notice of Appeal - Final Judgment, 620 Notice of Appeal - Final Judgment; REVERSED, VACATED & REMANDED. RE: 639 JUDGMENT of

DATE	NO.	DOCKET TEXT
		USCA, 640 JUDGMENT of USCA.
10/25/2013	642	***VACATED AS PER COURT (644) ORDER*** - ORDER re 639 U.S.C.A. Judgment and 640 U.S.C.A. Judgment as to Juan Bravo-Fernandez and Hector Martinez-Maldonado. The mandate having been issued (Docket No. 641), in accordance with the Judgments of the Court of Appeals (Docket Nos. 639 and 640), a judgment of acquittal shall be entered as to defendant Martinez's conspiracy count, as to defendant Bravo's conspiracy conviction, and as to both defendants' section 666 convictions. Signed by Judge Francisco A. Besosa on 10/25/2013.
10/25/2013	643	MOTION to Clarify by USA as to Juan Bravo-Fernandez, Hector Martinez-Maldonado. Suggestions in opposition/ response due by 11/12/2013
10/25/2013	644	ORDER re 643 Motion to Clarify as to Juan Bravo-Fernandez (1), Hector Martinez-Maldonado (2): NOTED. The Order at Docket No. 642 is VACATED. The

DATE	NO.	DOCKET TEXT
		Clerk is directed to enter a Judgment of Acquittal only as to defendant Martinez's and defendant Bravo's conspiracy counts. The defendants' section 666 convictions are VACATED. Signed by Judge Francisco A. Besosa on 10/25/13.
10/26/2013	645	Joint MOTION for acquittal reinstatement by Juan Bravo-Fernandez, Hector Martinez-Maldonado. Suggestions in opposition/response due by 11/12/2013
11/8/2013	646	ORDER re 645 Motion for Acquittal as to Juan Bravo-Fernandez (1) and Hector Martinez-Maldonado (2). Defendants' joint motion is DENIED. Signed by Judge Francisco A. Besosa on 11/08/2013.
11/12/2013	648	JUDGMENT OF ACQUITTAL as to Juan Bravo-Fernandez (1), Count 1, ACQUITTED; Count 4, VACATED. Signed by Judge Francisco A. Besosa on 11/12/2013.
11/12/2013	649	JUDGMENT OF ACQUITTAL as to Hector Martinez-Maldonado (2), Count 5,

DATE	NO.	DOCKET TEXT
		VACATED. Signed by Judge Francisco A. Besosa on 11/12/2013.
11/12/2013	650	AMENDED JUDGMENT as to Hector Martinez-Maldonado (2), Count 1, ACQUITTED; Count 5, VACATED. Signed by Judge Francisco A. Besosa on 11/12/2013
11/12/2013	651	AMENDED JUDGMENT as to Juan Bravo-Fernandez (1), Count 1, ACQUITTED; Count 4, VACATED. Signed by Judge Francisco A. Besosa on 11/12/2013.
11/14/2013	652	MOTION for acquittal on the Section 666 Charges Under the Double Jeopardy Clause and for Expedited Consideration by Juan Bravo-Fernandez, Hector Martinez-Maldonado. Suggestions in opposition/response due by 12/2/2013
12/23/2013	675	MEMORANDUM AND ORDER re 652 Motion for Acquittal as to Juan Bravo-Fernandez (1) and Hector Martinez-Maldonado (2): DENIED. Signed by Judge Francisco A. Besosa on 12/23/2013.

DATE	NO.	DOCKET TEXT
12/23/2013	676	NOTICE OF APPEAL (Interlocutory) as to Juan Bravo-Fernandez, re 648 Judgment, 644 Order on Motion to Clarify, 675 Order on Motion for Acquittal, 646 Order on Motion for Acquittal, 651 Amended Judgment.
12/23/2013	677	NOTICE OF APPEAL (Interlocutory) as to Hector Martinez-Maldonado re 675 Order on Motion for Acquittal, 650 Amended Judgment, 646 Order on Motion for Acquittal, 644 Order on Motion to Clarify,.
6/16/2015	684	Printed Opinion from USCA as to Juan Bravo-Fernandez (1), Hector Martinez-Maldonado (2) entered on 06/15/15 Re: 676 Notice of Appeal - Final Judgment filed by Juan Bravo-Fernandez, 677 Notice of Appeal - Final Judgment filed by Hector Martinez-Maldonado.
6/16/2015	685	JUDGMENT of USCA (certified copy) as to Juan Bravo-Fernandez (1) re Notice of Appeal - Final Judgment; AFFIRMED.

DATE	NO.	DOCKET TEXT
6/16/2015	686	JUDGMENT of USCA (certified copy) as to Hector Martinez-Maldonado (2) re Notice of Appeal - Final Judgment; AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Court of Appeals Docket No. 12-1289

UNITED STATES

v.

BRAVO-FERNANDEZ.

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
3/6/2012	CRIMINAL CASE docketed. Notice of appeal (doc. #620) filed by Appellant Juan Bravo-Fernandez.
3/8/2012	MOTION for bail pending appeal filed by Appellant Juan Bravo-Fernandez. Certificate of service dated 03/08/2012.
3/30/2012	ORDER entered by Sandra L. Lynch, Chief Appellate Judge; Michael Boudin, Appellate Judge and Rogeriee Thompson, Appellate Judge denying motion for bail pending appeal filed by Appellant Juan Bravo-Fernandez.
11/1/2012	CASE argued. Panel: Jeffrey R. Howard, Appellate Judge; Kermit V. Lipez, Appellate Judge and Rogeriee Thompson, Appellate Judge.

DATE	DOCKET TEXT
12/11/2012	RENEWED MOTION for bail pending appeal filed by Appellant Hector Martinez-Maldonado in 12-1290, Appellant Juan Bravo-Fernandez in 12-1289. Certificate of service dated 12/11/2012.
1/2/2013	ORDER entered by Jeffrey R. Howard, Appellate Judge; Kermit V. Lipez, Appellate Judge and Rogeriee Thompson, Appellate Judge granting motion for bail pending appeal filed by Appellant Juan Bravo-Fernandez, Appellant Hector Martinez-Maldonado.
6/26/2013	JUDGMENT entered by Jeffrey R. Howard, Appellate Judge; Kermit V. Lipez, Appellate Judge and Rogeriee Thompson, Appellate Judge. 12-1289 "Juan Bravo Fernandez's conspiracy conviction is revered, and the district court is directed to enter a judgment of acquittal. Juan Bravo Fernandez's 18 U.S.C. Sec. 666 conviction is vacated, and the matter is remanded for further proceedings consistent with the opinion issued this day.
6/26/2013	OPINION issued by Jeffrey R. Howard, Appellate Judge; Kermit V. Lipez, Appellate Judge and Rogeriee Thompson, Appellate Judge. Published.
10/22/2013	MANDATE issued.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Court of Appeals Docket No. 12-1290

UNITED STATES

v.

MARTINEZ-MALDONADO.

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
3/6/2012	CRIMINAL CASE docketed. Notice of appeal (doc. #621) filed by Appellant Hector Martinez-Maldonado.
3/7/2012	MOTION for bail pending appeal filed by Appellant Hector Martinez-Maldonado. Certificate of service dated 03/07/2012.
3/30/2012	ORDER entered by Sandra L. Lynch, Chief Appellate Judge; Michael Boudin, Appellate Judge and Rogeriee Thompson, Appellate Judge denying motion for bail pending appeal filed by Appellant Hector Martinez-Maldonado.
11/1/2012	CASE argued. Panel: Jeffrey R. Howard, Appellate Judge; Kermit V. Lipez, Appellate Judge and Rogeriee Thompson, Appellate Judge.

DATE	DOCKET TEXT
12/11/2012	RENEWED MOTION for bail pending appeal filed by Appellant Hector Martinez-Maldonado in 12-1290, Appellant Juan Bravo-Fernandez in 12-1289.
1/2/2013	ORDER entered by Jeffrey R. Howard, Appellate Judge; Kermit V. Lipez, Appellate Judge and Rogeriee Thompson, Appellate Judge granting motion for bail pending appeal filed by Appellant Juan Bravo-Fernandez, Appellant Hector Martinez-Maldonado.
6/26/2013	JUDGMENT entered by Jeffrey R. Howard, Appellate Judge; Kermit V. Lipez, Appellate Judge and Rogeriee Thompson, Appellate Judge. 12-1290 "The district court's order declaring a mistrial as to Hector Martinez Maldonado's conspiracy count is reversed, and the district court is directed to enter a judgment of acquittal. Hector Martinez Maldonado's 18 U.S.C. Sec. 666 conviction is vacated, and the matter is remanded to the district court for further proceedings consistent with the opinion issued this day."
6/26/2013	OPINION issued by Jeffrey R. Howard, Appellate Judge; Kermit V Lipez, Appellate Judge and Rogeriee Thompson, Appellate Judge. Published.
10/22/2013	MANDATE issued.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Court of Appeals Docket No. 14-1089

UNITED STATES

v.

BRAVO-FERNANDEZ.

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
1/21/2014	CRIMINAL CASE docketed. Notice of appeal (doc. #676) filed by Appellant Juan Bravo-Fernandez.
1/8/2015	CASE argued. Panel: Jeffrey R. Howard, Appellate Judge; Kermit V. Lipez, Appellate Judge and David J. Barron, Appellate Judge.
6/15/2015	OPINION issued by Jeffrey R. Howard, Appellate Judge; Kermit V. Lipez, Appellate Judge and David J. Barron, Appellate Judge. Published.
6/15/2015	JUDGMENT entered by Jeffrey R. Howard, Appellate Judge; Kermit V. Lipez, Appellate Judge and David J. Barron, Appellate Judge. 14-1089 Affirmed.
7/27/2015	ORDER entered by Jeffrey R. Howard, Chief Appellate Judge; Juan R.

DATE	DOCKET TEXT
	Torruella, Appellate Judge (* Judge Torruella is recused and did not participate in the consideration of this matter*); Sandra L. Lynch, Appellate Judge; Kermit V. Lipez, Appellate Judge; Rogeriee Thompson, Appellate Judge; William J. Kayatta , Jr., Appellate Judge and David J. Barron, Appellate Judge denying petition for rehearing en banc filed by Appellant Juan Bravo-Fernandez, Appellant Hector Martinez-Maldonado; denying petition for panel rehearing filed by Appellant Juan Bravo-Fernandez, Appellant Hector Martinez-Maldonado.
8/6/2015	ORDER entered by David J. Barron, Appellate Judge: Upon consideration of the defendants-appellants' opposed joint motion to stay the mandate, the motion is granted. The issuance of the mandate is hereby stayed for 90 days and, if within that period a timely petition for writ of certiorari is filed, shall continue until final disposition of such petition by the United States Supreme Court. Should any petition for writ certiorari be denied, mandate shall issue forthwith. Counsel for the defendants-appellants are directed to promptly notify the Clerk of this court both of the filing of any such petition for writ of certiorari and its disposition.

DATE	DOCKET TEXT
3/28/2016	U.S. SUPREME COURT ORDER entered on 03/28/2016. The petition for a writ of certiorari was granted.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Court of Appeals Docket No. 14-1091

UNITED STATES

v.

MARTINEZ-MALDONADO.

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
1/21/2014	CRIMINAL CASE docketed. Notice of appeal (doc. #677) filed by Appellant Hector Martinez-Maldonado.
1/8/2015	CASE argued. Panel: Jeffrey R. Howard, Appellate Judge; Kermit V. Lipez, Appellate Judge and David J. Barron, Appellate Judge.
6/15/2015	OPINION issued by Jeffrey R. Howard, Appellate Judge; Kermit V Lipez, Appellate Judge and David J. Barron, Appellate Judge. Published.
6/15/2015	JUDGMENT entered by Jeffrey R. Howard, Appellate Judge; Kermit V. Lipez, Appellate Judge and David J. Barron, Appellate Judge. 14-1091 Affirmed
7/27/2015	ORDER entered by Jeffrey R. Howard, Chief Appellate Judge; Juan R.

DATE	DOCKET TEXT
	Torruella, Appellate Judge (* Judge Torruella is recused and did not participate in the consideration of this matter*); Sandra L. Lynch, Appellate Judge; Kermit V. Lipez, Appellate Judge; Rogeriee Thompson, Appellate Judge; William J. Kayatta , Jr., Appellate Judge and David J. Barron, Appellate Judge denying petition for rehearing en banc filed by Appellant Juan Bravo-Fernandez, Appellant Hector Martinez-Maldonado; denying petition for panel rehearing filed by Appellant Juan Bravo-Fernandez, Appellant Hector Martinez-Maldonado.
8/6/2015	ORDER entered by David J. Barron, Appellate Judge: Upon consideration of the defendants-appellants' opposed joint motion to stay the mandate, the motion is granted. The issuance of the mandate is hereby stayed for 90 days and, if within that period a timely petition for writ of certiorari is filed, shall continue until final disposition of such petition by the United States Supreme Court. Should any petition for writ certiorari be denied, mandate shall issue forthwith. Counsel for the defendants-appellants are directed to promptly notify the Clerk of this court both of the filing of any such petition for writ of certiorari and its disposition.

DATE	DOCKET TEXT
3/28/2016	U.S. SUPREME COURT ORDER entered on 03/28/2016. The petition for a writ of certiorari was granted.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Filed 06/22/10]

Cr. No. 10-232 (JAF)

UNITED STATES OF AMERICA,
Plaintiff,

v.

JUAN BRAVO FERNANDEZ

and

HECTOR MARTINEZ MALDONADO,
Defendants.

CRIMINAL VIOLATIONS:

Count One:	Conspiracy, 18 U.S.C. § 371
Count Two:	Interstate Travel in Aid of Racketeering, 18 U.S.C. §§ 1952(a)(3)(A) & 2 (BRAVO)
Count Three:	Interstate Travel in Aid of Racketeering, 18 U.S.C. §§ 1952(a)(3)(A) & 2 (MARTINEZ)
Count Four:	Federal Program Bribery, 18 U.S.C. §§ 666(a)(2) & 2 (BRAVO)
Count Five:	Federal Program Bribery, 18 U.S.C. §§ 666(a)(1)(B) & 2 (MARTINEZ)
Count Six:	Obstruction of Justice, 18 U.S.C. § 1512(b)(3) & 2 (MARTINEZ)

INDICTMENT

The Grand Jury charges:

GENERAL ALLEGATIONS

At all times relevant to this indictment:

Introduction

1. The Commonwealth of Puerto Rico was a self-governing Commonwealth in association with the United States of America. The Commonwealth of Puerto Rico was governed by executive, legislative, and judicial branches. The legislative power resided in the Puerto Rico Senate and the Puerto Rico House of Representatives.

2. In calendar years 2004 and 2005, the Commonwealth of Puerto Rico received more than $10,000 in federal benefits.

3. The Senate consisted of twenty-seven members, two from each of eight electoral districts, and eleven at large members. Senators served four-year terms; legislators in the House also served four-year terms.

4. A Senator's duties included, but were not limited to: (a) investigating, studying, assessing, reporting, making recommendations, and amending or substituting measures or matters related to the jurisdiction of the Senate or the Senator's Committee; (b) scheduling and holding public hearings and executive meetings, summoning witnesses, and hearing testimony related to measures or matters within the jurisdiction of the Senate or the Senator's Committee; (c) drafting, filing, and voting on bills of law, resolutions, and substitute measures; and (d) appraising, approving, and overseeing budgets and particular expenditures of the Commonwealth.

Individuals and Entities

5. Defendant HECTOR JAVIER MARTINEZ MALDONADO (hereinafter "MARTINEZ") was first elected as a member of the Puerto Rico Senate in 2004. Defendant MARTINEZ was re-elected in 2008.

6. In or about January 2005, defendant MARTINEZ took his Oath of Office as a Puerto Rico Senator, swearing in pertinent part, "that I will defend the Constitution of the United States and the Constitution and laws of the Commonwealth of Puerto Rico, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."

7. Beginning in or about Januaiy 2005, defendant MARTINEZ served as Chair of the Public Safety Committee of the Puerto Rico Senate, which exercised legislative jurisdiction over issues related to community safety. As Chair of the Public Safety Committee, defendant MARTINEZ exercised significant control over legislation related to the security and general welfare of Puerto Rico.

8. Defendant JUAN BRAVO FERNANDEZ (hereinafter "BRAVO") served as the owner and President of an entity known to the members of the grand jury and identified herein as "Company A," one of the largest private security firms in Puerto Rico.

9. Company A has approximately 2,000 employees, and Company A's clients included some of Puerto Rico's largest shopping centers.

10. Jorge de Castro Font (hereinafter "de Castro Font") was first elected as a member of the Puerto Rico House of Representatives in 1988. De Castro Font was re-elected in 1992, 1996, and 2000. De Castro Font was elected to the Puerto Rico Senate in November 2004. He was re-elected to the Senate in November 2008, but resigned from the Senate in or about December 2008.

11. When de Castro Font joined the Senate in January 2005, he served as Chair of the Committee on Rules and Calendars, and as Chair de Castro Font exercised significant control over which bills, confirmations, and other matters were brought to a vote on the floor of the Senate and when they were brought to a vote.

12. In 2004, the Puerto Rico legislature considered a bill known as the "Private Security Guards and Agencies Act of Puerto Rico." In the Puerto Rico House of Representatives, this legislation was described as "HR Project 4756." This legislation would have, among other things, required the president of all private security firms doing business in Puerto Rico to obtain and maintain a private detective license. The presidents of several private security firms in Puerto Rico who were competing with Company A did not have private detective licenses. This legislation was supported by defendant BRAVO and his associates, but failed to become law during the legislative session and had to be reintroduced during the legislative session beginning in 2005.

13. In 2005, a new four-year legislative session commenced, and the Puerto Rico legislature again considered the "Private Security Guards and Agencies Act of Puerto Rico." The legislation was introduced in the Puerto Rico Senate, where it was described as "Senate Project 471." This legislation would have,

among other things, required the president of all private security firms doing business in Puerto Rico to secure and maintain private detective licenses. The presidents of several private security firms in Puerto Rico who were competing with Company A did not have private detective licenses. This legislation was supported by defendant BRAVO and his associates.

14. In 2005, the Puerto Rico legislature considered a bill seeking to establish the "Code of Protection and Safety of Visitors, Employees and Tenants of Shopping Centers." In the Puerto Rico Senate, this legislation was described as "Senate Project 410." This legislation would have, among other things, permitted commercial shopping centers to develop a Code of Conduct for its premises to be enforced by private security firms, such as Company A. This legislation was supported by defendant BRAVO and his associates, including the commercial shopping centers that retained Company A's services.

COUNT ONE
(Conspiracy)

The Conspiracy

15. The Grand Jury realleges paragraphs 1 through 14 as though fully set forth herein.

16. From no later than early-2004 through in or about May 2005, in the Commonwealth of Puerto Rico, and elsewhere, the defendants,

JUAN BRAVO FERNANDEZ

AND

HECTOR MARTINEZ MALDONADO,

did knowingly, intentionally, and willfully combine, conspire, confederate, and agree with each other, and

with Jorge de Castro Font and others both known and unknown to the members of the grand jury, to commit the following offenses against the United States:

a. Bribery Concerning Programs Receiving Federal Funds: that is, for defendant BRAVO to corruptly give, offer, and agree to give things of value to defendant MARTINEZ and de Castro Font, agents of the Commonwealth of Puerto Rico government, a government which during each relevant one-year period received federal benefits in excess of $10,000, with intent to influence and reward defendant MARTINEZ and de Castro Font in connection with a transaction and series of transactions valued at $5,000 or more, that is legislation benefitting Company A, in violation of Title 18, United States Code, Sections 666(a)(2) and 2;

b. Bribery Concerning Programs Receiving Federal Funds: that is, for defendant MARTINEZ and de Castro Font, agents of the Commonwealth of Puerto Rico government, a government which during each relevant one-year period received federal benefits in excess of $10,000, to corruptly solicit, demand, accept, and agree to accept for their own benefit, things of value from defendant BRAVO, intending to be influenced and rewarded in connection with a transaction and series of transactions valued at $5,000 or more, that is legislation benefitting Company A, in violation of Title 18, United States Code, Sections 666(a)(1)(B) and 2; and

c. Interstate Travel in Aid of Racketeering: that is, to travel in interstate commerce from the Commonwealth of Puerto Rico to the State of

Nevada, with intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on, of an unlawful activity, to wit bribery in violation of the laws of the United States and the Commonwealth of Puerto Rico, in violation of Title 18, United States Code, Sections 1952(a)(3)(A) and 2.

Purposes of the Conspiracy

17. It was a purpose of the conspiracy for defendant MARTINEZ and de Castro Font to enrich themselves by using and agreeing to use their official positions in exchange for accepting things of value from defendant BRAVO, including a trip to Las Vegas, Nevada, in or about May 2005, that included tickets to a high-profile professional boxing match worth approximately $1,000 each.

18. It was a further purpose of the conspiracy for defendant BRAVO to enrich himself and Company A by corruptly securing official legislative action from defendant MARTINEZ and de Castro Font, as Puerto Rico legislators, including action immediately upon their return from Las Vegas in or about May 2005.

19. It was a further purpose of the conspiracy for defendant MARTINEZ and de Castro Font to conceal from the Puerto Rico Senate and the people of the Commonwealth of Puerto Rico the things of value defendant MARTINEZ and de Castro Font received from defendant BRAVO, and to conceal the fact that defendant MARTINEZ and de Castro Font performed official legislative actions in return for, influenced by, and rewarded by things of value from defendant BRAVO.

Manner and Means of the Conspiracy

20. The manner and means of the conspiracy included, but were not limited to, the following:

a. Defendant MARTINEZ and de Castro Font, while serving as elected members of the Puerto Rico legislature, solicited and accepted things of value from defendant BRAVO, including a trip to Las Vegas, Nevada, in or about May 2005, that included tickets to a high-profile professional boxing match worth approximately $1,000 each.

b. Defendant BRAVO made payments of cash and other concealed and disguised payments to de Castro Font through the use of fraudulent invoices and the use of campaign vendors as intermediaries.

c. Defendant MARTINEZ and de Castro Font engaged in official actions as Puerto Rico legislators on behalf of and benefitting defendant BRAVO and Company A, including sponsoring legislation, "fast tracking" legislation, attempting to influence other legislators to vote for legislation, conducting hearings on legislation, and voting for legislation that was supported by defendant BRAVO and Company A.

Overt Acts

21. In furtherance of the conspiracy and to achieve its purposes, defendants MARTINEZ and BRAVO, de Castro Font, and other individuals known and unknown to the grand jury, committed the following overt acts, among others, in the District of Puerto Rico and elsewhere:

Cash and Disguised Payments from Defendant BRAVO to de Castro Font in 2004

22. Between at least in or about early 2004 and May 2005, defendant BRAVO provided periodic cash payments to de Castro Font in amounts between approximately $500 to $2,000. Defendant BRAVO provided the cash to de Castro Font by making a check out to an individual known to the grand jury and identified herein as "Company A's messenger" and sending Company A's messenger to the bank to cash the check. When Company A's messenger returned from the bank, defendant BRAVO put the cash in a sealed envelope and handed it to his assistant with instructions to deliver it to de Castro Font's assistant.

23. On or about April 27, 2004, in order to obtain funds from defendant BRAVO and Company A without detection, de Castro Font caused Company B, a public relations firm that de Castro Font used for his political campaigns and with whom de Castro Font had accrued a substantial financial debt, to send invoice No. 7544 to Company A, which falsely stated that work had been performed by Company B for Company A and that $5,000 was due.

24. On or about April 29, 2004, knowing that Company B provided no work and performed no services for Company A, defendant BRAVO caused Company A to issue a check in the amount of $5,000 to Company B in full payment of Invoice No. 7544, knowing that the payment was solely intended to benefit de Castro Font.

25. On or about May 31, 2004, in order to obtain funds from defendant BRAVO and Company A without detection, de Castro Font caused Company B to send invoice No. 7569 to Company A, which falsely

stated that work had been performed by Company B for Company A and that $5,000 was due.

26. On or about June 22, 2004, during the 2001-2004 legislative session, defendant BRAVO sent a letter to the Puerto Rico legislature in support of HR Project 4756—the House version of what became Senate Project 471 during the 2005-2008 legislative session.

27. On or about June 23, 2004, de Castro Font voted to approve HR Project 4756 in the House of Representatives.

28. On or about July 16, 2004, knowing that Company B provided no work and performed no services for Company A, defendant BRAVO caused Company A to issue a check in the amount of $5,000 to Company B in full payment of Invoice No. 7569, knowing that the payment was solely intended to benefit de Castro Font.

29. On or about August 28, 2004, in order to obtain funds from defendant BRAVO and Company A without detection, de Castro Font caused Company C, a gas station that de Castro Font used for his political campaigns and with whom de Castro Font had accrued a substantial financial debt, to send an invoice to Company A, which falsely stated that services had been performed by Company C for Company A and that $2,500 was due,

30. Shortly thereafter, knowing that Company C performed no services for Company A, defendant BRAVO caused Company A to pay $2,500 to Company C in full payment of the false invoice, knowing that the payment was solely intended to benefit de Castro Font.

31. On or about September 24, 2004, in order to obtain funds from defendant BRAVO and Company A without detection, de Castro Font caused Company B to send invoice No. 7670 to Company A, which falsely stated that work had been performed by Company Firm B for Company A and that $2,500 was due.

32. On or about October 4, 2004, knowing that Company B provided no work and performed no services for Company A, defendant BRAVO caused Company A to issue a check in the amount of $2,500 to Company B in full payment of Invoice No. 7670, knowing that the payment was solely intended to benefit de Castro Font,

33. On or about October 4, 2004, in order to obtain funds from defendant BRAVO and Company A without detection, de Castro Font caused Company C to send an invoice to Company A, which falsely stated that services had been performed by Company C for Company A and that $2,500 was due.

34. On or about October 4, 2004, knowing that Company C performed no services for Company A, defendant BRAVO caused Company A to pay $2,500 to Company C in full payment of the false invoice, knowing that the payment was solely intended to benefit de Castro Font.

35. On or about October 5, 2004, in order to obtain funds from defendant BRAVO and Company A without detection, de Castro Font caused Company B to send invoice No. 7674 to Company A, which falsely stated that work had been performed by Company B for Company A and that $2,500 was due.

36. On or about October 26, 2004, knowing that Company B provided no work and performed no services for Company A, defendant BRAVO caused

Company A to issue a check in the amount of $2,500 to Company B in full payment of Invoice No. 7674, knowing that the payment was solely intended to benefit de Castro Font.

37. On or about November 17, 2004, knowing that Company C performed no services for Company A, defendant BRAVO caused Company A to pay $2,500 to Company C in full payment of a false invoice, knowing that the payment was solely intended to benefit de Castro Font.

The 2005 Legislation and Trip to Las Vegas

38. In or about early 2005, defendant BRAVO hosted a meeting at his Company A office in which he invited several executives from other Puerto Rico-based private detective firms. Defendant BRAVO made clear that the purpose of this meeting was to discuss amending the private detective law to, among other things, eliminate competition from existing private security firms. Defendant BRAVO proposed changing the law to require the general managers, or presidents, of private security firms operating in Puerto Rico to hold a private detective's license, which if passed would eliminate several of Company A's competitors. During this meeting, defendant BRAVO told the executives that he was drafting such a private detective bill.

39. In or about February 2005, defendant BRAVO met with de Castro Font seeking assistance on a legislative project dealing with a "code of conduct" for shopping malls. During this meeting, de Castro Font told defendant BRAVO that in order to secure passage of the legislation defendant BRAVO needed to secure the assistance of defendant MARTINEZ, who was

Chair of the Public Safety Committee, the Committee that would exercise jurisdiction over the legislation.

40. In or about February 2005, defendant BRAVO met on multiple occasions with defendant MARTINEZ and Person A, a close friend and professional mentor of defendant MARTINEZ, as well as a legal advisor to the Public Safety Committee, at defendant MARTINEZ' Senate office. During these meetings, defendant BRAVO provided defendant MARTINEZ with drafts of two pieces of legislation, which would become Senate Project 410 and Senate Project 471. Defendant BRAVO and defendant MARTINEZ met several more times during February and March 2005 to discuss defendant MARTINEZ' support of the two pieces of legislation.

41. In or about February 2005, defendant MARTINEZ instructed Person B, a legal advisor to the Public Safety Committee, to work on the legislation that became Senate Project 410 and Senate Project 471. During this meeting, defendant MARTINEZ gave Person B hard copies of the drafts of Senate Project 410 and Senate Project 471 that had been provided by defendant BRAVO, and defendant MARTINEZ instructed Person B to reformat the bills so that it appeared as if they had been drafted and sponsored by defendant MARTINEZ, rather than an outside source.

42. In or about February 2005, during a conversation about defendant BRAVO'S legislative projects, defendant BRAVO offered de Castro Font a trip to Las Vegas to watch the May 14, 2005, Felix "Tito" Trinidad vs. Winky Wright professional boxing match. De Castro Font accepted the offer.

43. In or about February 2005, defendant BRAVO asked de Castro Font to extend the same offer about the trip to Las Vegas to defendant MARTINEZ. De Castro Font did so, and defendant MARTINEZ also accepted the offer.

44. On or about February 25, 2005, de Castro Font dictated a memorandum to his assistant, stating that "Juan Bravo's project to be submitted by fast track."

45. In or about early March 2005, defendant BRAVO caused an order to be placed with Don King Productions for four (4) tickets to the May 14, 2005, professional boxing match between Felix "Tito" Trinidad and Winky Wright, at a cost of approximately $1,000 each, the face value of the each ticket.

46. On or about March 2, 2005, defendant BRAVO caused Company A to issue a check in the amount of $4,000 to Don King Productions as payment for the four (4) tickets to the Felix "Tito" Trinidad vs. Winky Wright professional boxing match.

47 On or about March 2, 2005, defendant MARTINEZ submitted Senate Project 410, defendant BRAVO's code of conduct legislation, for consideration by the Puerto Rico Senate.

48. On or about March 8, 2005, defendant BRAVO met with defendant MARTINEZ and others known and unknown to the members of the grand jury, including Person A and Person B, to discuss the status of defendant BRAVO's private detective legislation.

49. In or about mid-March 2005, during a conversation about Senate Project 410 and Senate Project 471 with defendant MARTINEZ and Person A, defendant BRAVO discussed the trip to Las Vegas with defendant MARTINEZ and offered Person A, who

was working on defendant BRAVO's legislation, the same trip to Las Vegas to watch the May 2005 professional boxing match between Felix "Tito" Trinidad and Winky Wright. Person A declined the offer. After defendant BRAVO left, Person A told defendant MARTINEZ that because of defendant BRAVO's support for Senate Project 410 and Senate Project 471, both of which defendant MARTINEZ had agreed to sponsor, it was not proper for defendant MARTINEZ to accept the trip.

50. On or about March 18, 2005, defendant MARTINEZ submitted Senate Project 471, defendant BRAVO's private detective legislation, for consideration by the Puerto Rico Senate.

51. On or about April 12, 2005, defendant MARTINEZ presided over a Public Safety Committee hearing regarding Senate Project 410, at which defendant BRAVO and another representative of Company A were the only representatives of the private security industry to testify.

52. Shortly after the April 12, 2005, Public Safety Committee hearing, defendant MARTINEZ authorized the preparation of a Public Safety Committee report in support of Senate Project 410.

53. On or about April 20, 2005, defendant MARTINEZ presided over a Public Safety Committee hearing regarding Senate Project 471, at which defendant BRAVO was the only representative of the security industry to testify.

54. Shortly after the April 20, 2005, Public Safety Committee hearing, defendant MARTINEZ authorized the preparation of a Public Safety Committee report in support of Senate Project 471.

55. On or about April 21, 2005, defendant BRAVO used, or authorized the use of, his personal credit card to reserve a hotel room at the Mandalay Bay Resort and Casino in Las Vegas, Nevada. The deposit for this hotel room was credited to defendant MARTINEZ' hotel room.

56. On or about May 5, 2005, defendant BRAVO used, or authorized the use of, his personal credit card to reserve two additional hotel rooms at the Mandalay Bay Resort and Casino in Las Vegas, Nevada. The deposits for these hotel rooms were credited to defendant BRAVO's hotel room and de Castro Font's hotel room.

57. In or about the spring of 2005, defendant BRAVO arranged first-class round trip airline tickets for himself, defendant MARTINEZ, and de Castro Font, from Puerto Rico to Las Vegas.

58. On or about May 11, 2005, defendant MARTINEZ, as Chair of the Public Safety Committee, caused the Public Safety Committee to issue a report in support of Senate Project 471.

59. On or about May 13, 2005, defendant BRAVO, defendant MARTINEZ, de Castro Font, and others known and unknown to members of the grand jury, traveled from San Juan, Puerto Rico, to Las Vegas, Nevada. Defendant BRAVO, defendant MARTINEZ, and de Castro Font were seated in the first-class cabin during the flights.

60. On or about May 13, 2005, defendant BRAVO, defendant MARTINEZ, and de Castro Font were picked up at the Las Vegas airport in a limousine which had been arranged and paid for by defendant BRAVO.

61. On or about May 13, 2005, defendant BRAVO, defendant MARTINEZ, and de Castro Font checked into the Mandalay Bay Resort and Casino in Las Vegas, Nevada, where they stayed for two nights, at a cost of approximately $935.22 for defendant MARTINEZ and $1,066.01 for de Castro Font. Defendant BRAVO paid for the first night for both defendant MARTINEZ and de Castro Font using his personal credit card. De Castro Font initially paid for himself and defendant MARTINEZ for the second night, but was subsequently reimbursed in cash by defendant BRAVO for those expenses upon return to Puerto Rico.

62. On or about May 13, 2005, defendant BRAVO, defendant MARTINEZ, and others known and unknown to the members of the grand jury, ate at a restaurant in the MGM Grand, where defendant BRAVO incurred a charge of approximately $500 on his personal credit card. During the trip, defendant BRAVO also paid for other meals, drinks, and expenses for defendant MARTINEZ and de Castro Font.

63. On or about May 14, 2005, defendant BRAVO, defendant MARTINEZ, de Castro Font, and others known and unknown to the members of the grand jury, attended the Felix "Tito" Trinidad vs. Winky Wright professional boxing match at the MGM Grand Hotel and Casino in Las Vegas, Nevada. The three men sat in seats approximately seven rows up from the floor, using the tickets previously purchased by defendant BRAVO for approximately $1,000 each.

64. On or about May 15, 2005, defendant BRAVO, defendant MARTINEZ, and de Castro Font traveled from Las Vegas, Nevada, to Miami, Florida. All three men were seated in the first-class cabin.

65. On or about May 15, 2005, defendant BRAVO, defendant MARTINEZ, and de Castro Font checked into the Marriott South Beach in Miami Beach, Florida, where they stayed in individual hotel rooms reserved and paid for by defendant BRAVO using his personal credit card at a total cost of $954.75, approximately $318.25 per person.

66. On or about May 16, 2005, defendant BRAVO, defendant MARTINEZ, and de Castro Font traveled from Miami, Florida, to San Juan, Puerto Rico. All three men sat together in the first-class cabin of the plane.

67. Throughout the duration of the trip to Las Vegas, defendant BRAVO, defendant MARTINEZ, and de Castro Font discussed Senate Projects 410 and 471, and defendant MARTINEZ and de Castro Font agreed to take official actions immediately upon their return from the trip to Las Vegas in order to influence the passage of the legislation.

68. Upon returning to Puerto Rico, defendant BRAVO instructed de Castro Font to destroy the airline receipts for the Las Vegas trip, which reflected that the first-class tickets were paid for in cash.

69. On or about May 17, 2005, de Castro Font, as Chair of the Committee on Rules and Calendars, scheduled an immediate vote on the floor of the Puerto Rico Senate for Senate Project 471.

70. On or about May 17, 2005, with the support of defendant MARTINEZ and de Castro Font, the full Puerto Rico Senate approved Senate Project 471.

71. On or about May 18, 2005, defendant MARTINEZ, as Chair of the Public Safety Committee, caused the Public Safety Committee to issue a report in support of Senate Project 410.

72. On or about May 23, 2005, de Castro Font, as Chair of the Committee on Rules and Calendars, scheduled an immediate vote on the floor of the Puerto Rico Senate for Senate Project 410.

73. On or about May 23, 2005, with the support of defendant MARTINEZ and de Castro Font, the full Puerto Rico Senate approved Senate Project 410.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO

(Interstate Travel in Aid of Racketeering)

74. The Grand Jury realleges paragraphs 1 through 73 of this Indictment as though fully stated herein.

75. On or about May 13, 2005, defendant,

JUAN BRAVO FERNANDEZ,

traveled in interstate commerce, from San Juan, Puerto Rico, in the District of Puerto Rico, to Las Vegas, Nevada, with the intent to:

a. Promote, establish, carry on, and facilitate the promotion, establishment, and carrying on, of an unlawful activity, to wit bribery in violation of Title 18, United States Code, Sections 666(a)(1)(B) and 666(a)(2), and thereafter did perform and attempt to perform acts to promote, manage, and carry on, and facilitate the promotion, management, and carrying on, of that unlawful activity; that is, defendant BRAVO corruptly gave, offered, promised, and

agreed to give defendant MARTINEZ and de Castro Font a trip to Las Vegas, Nevada, including round trip airfare, hotel rooms, meals, drinks, and tickets to attend the Felix "Tito" Trinidad vs. Winky Wright professional boxing match, with intent to influence and reward defendant MARTINEZ and de Castro Font in connection with their official actions in support of Senate Projects 410 and 471, which were the business, transactions, and series of transactions of the Commonwealth of Puerto Rico valued at more than $5,000; and

b. Promote, establish, carry on, and facilitate the promotion, establishment, and carrying on, of an unlawful activity, to wit bribery in violation of 33 L.P.R.A. §§ 4360 and 4363, and thereafter did perform and attempt to perform acts to promote, manage, and carry on, and facilitate the promotion, management, and carrying on, of that unlawful activity; that is, defendant BRAVO promised to give and gave defendant MARTINEZ and de Castro Font a trip to Las Vegas, Nevada, including round trip airfare, hotel rooms, meals, drinks, and tickets to attend the Felix "Tito" Trinidad vs. Winky Wright professional boxing match, for the purpose of defendant MARTINEZ and de Castro Font taking officials actions in support of Senate Projects 410 and 471.

All in violation of Title 18, United States Code, Sections 1952(a)(3)(A) and 2.

COUNT THREE

(Interstate Travel in Aid of Racketeering)

76. The Grand Jury realleges paragraphs 1 through 73 of this Indictment as though fully stated herein.

77. On or about May 13, 2005, defendant,

HECTOR MARTINEZ MALDONADO,

traveled in interstate commerce, from San Juan, Puerto Rico, in the District of Puerto Rico, to Las Vegas, Nevada, with the intent to:

a. Promote, establish, carry on, and facilitate the promotion, establishment, and carrying on, of an unlawful activity, to wit bribery in violation of Title 18, United States Code, Sections 666(a)(1)(B) and 666(a)(2), and thereafter did perform and attempt to perform acts to promote, manage, and carry on, and facilitate the promotion, management, and carrying on, of that unlawful activity; that is being an agent of the government of the Commonwealth of Puerto Rico, defendant MARTINEZ did corruptly solicit, demand, ask for, receive, accept and agree to accept from defendant BRAVO a trip to Las Vegas, Nevada, including round trip airfare, hotel rooms, meals, drinks, and a ticket to attend the Felix "Tito" Trinidad vs. Winky Wright professional boxing match, intending to be influenced and rewarded in connection with a business, transaction, and series of transactions of the Puerto Rico government valued at more than $5,000, that is, Senate Projects 410 and 471; and

b. Promote, establish, carry on, and facilitate the promotion, establishment, and carrying on, of

an unlawful activity, to wit bribery in violation of 33 L.P.R.A. § 4360, and thereafter did perform and attempt to perform acts to promote, manage, and carry on, and facilitate the promotion, management, and carrying on, of that unlawful activity; that is, defendant MARTINEZ received from defendant BRAVO a trip to Las Vegas, Nevada, including round trip airfare, hotel rooms, meals, drinks, and tickets to attend the Felix "Tito" Trinidad vs. Winky Wright professional boxing match, for the purpose of defendant MARTINEZ taking officials actions in support of Senate Projects 410 and 471.

All in violation of Title 18, United States Code, Sections I952(a)(3)(A) and 2.

COUNT FOUR
(Bribery Concerning Programs
Receiving Federal Funds)

78. The grand jury realleges paragraphs 1 through 73 of this Indictment as though fully set forth herein.

79. The Commonwealth of Puerto Rico was a State Government which received federal assistance in excess of $10,000 during the twelve months preceding May 15, 2005, and during the twelve months following May 15, 2005.

80. At all times relevant to this Indictment, defendant MARTINEZ and de Castro Font were agents of the Commonwealth of Puerto Rico whose duties included those of an elected Senator of the Commonwealth of Puerto Rico.

81. In or about May 2005, in the District of Puerto Rico and elsewhere, defendant,

JUAN BRAVO FERNANDEZ,

did corruptly give, offer, and agree to give to defendant MARTINEZ and de Castro Font things of value, that is, a trip to Las Vegas, Nevada, including round trip airfare, hotel rooms, meals, drinks, and tickets to attend the Felix "Tito" Trinidad vs. Winky Wright professional boxing match for defendant MARTINEZ and de Castro Font, with intent to influence and reward defendant MARTINEZ and de Castro Font in connection with a business, transaction, and series of transactions of the Puerto Rico government valued at more than $5,000, that is, Senate Projects 410 and 471.

All in violation of Title 18, United States Code, Sections 666(a)(2) and 2.

COUNT FIVE

(Bribery Concerning Programs Receiving Federal Funds)

82. The grand jury realleges paragraphs 1 through 73 of this Indictment as though fully set forth herein.

83. The Commonwealth of Puerto Rico was a State Government which received federal assistance in excess of $10,000 during the twelve months preceding May 15, 2005, and during the twelve months following May 15, 2005.

84. At all times relevant to this Indictment, defendant MARTINEZ and de Castro Font were agents of the Commonwealth of Puerto Rico whose duties included those of an elected Senator of the Commonwealth of Puerto Rico

85. In or about May 2005, in the District of Puerto Rico and elsewhere, defendant,

HECTOR MARTINEZ MALDONADO,

did corruptly solicit and demand for his own benefit, and accepted and agreed to accept, a thing of value from defendant BRAVO, that is, a trip to Las Vegas, Nevada, including round trip airfare, hotel rooms, meals, drinks, and a ticket to attend the Felix "Tito" Trinidad vs. Winky Wright professional boxing match, intending to be influenced and rewarded in connection with a business, transaction, and series of transactions of the Puerto Rico government valued at more than $5,000, that is, Senate Projects 410 and 471.

All in violation of Title 18, United States Code, Sections 666(a)(1)(B) and 2.

COUNT SIX

(Obstruction of Justice)

86. The grand jury realleges paragraphs 1 through 73 of this Indictment as though fully set forth herein.

87. In or about January 2009, the FBI began investigating the bribery scheme involving defendant BRAVO, defendant MARTINEZ, de Castro Font, the trip to Las Vegas, and the legislation that became Senate Project 410 and Senate Project 471.

88. In or about January or February 2010, defendant MARTINEZ contacted Person B, who had been but was no longer an employee of the Senate, and informed Person B that he wanted to meet with Person B to discuss some legislation. During this meeting, which took place at the Capitol Building, defendant MARTINEZ told Person B that defendant MARTINEZ was being investigated related to the trip to Las Vegas

and the legislation that became Senate Project 410 and Senate Project 471. Defendant MARTINEZ then told Person B that Person B was likely to be contacted by the FBI and, when contacted, Person B should remember that Person B had prepared the bills that became Senate Project 410 and Senate Project 471. Person B and defendant MARTINEZ both knew this was not true.

89. In or about February or March 2010, defendant MARTINEZ again spoke to Person B about the FBI's investigation into the conduct described above. During this conversation, defendant MARTINEZ again told Person B that if Person B is contacted by the FBI to remember that Person B is the person who prepared the bills that became Senate Project 410 and Senate Project 471. Person B and defendant MARTINEZ both knew this was not true. Immediately thereafter, defendant MARTINEZ asked Person B about the well being of Person B's son, who is an employee of the Puerto Rico Senate, which Person B interpreted as a possible threat against his son.

90. In or about the end of March 2010, Person B received a phone call from Person C, who has been working as the Director of defendant MARTINEZ' Senate office since defendant MARTINEZ took his Oath of Office in January 2005, insisting that she meet with Person B that day. At Person C's insistence, Person B met with Person C in the parking lot of a shopping center. During this meeting, Person C delivered to Person B some documents related to the bills that became Senate Project 410 and Senate Project 471, and reminded Person B that Person B had prepared these bills. After Person C told Person B to remember that Person B had prepared the bills that became Senate Project 410 and Senate Project 471,

Person C told Person B that his testimony will be the most important to defendant MARTINEZ' defense.

91. In or about the end of March 2010, Person B received another phone call from Person C requesting yet another meeting. At Person C's insistence, Person B met with Person C in person. During this meeting, Person C asked Person B to sign a sworn statement falsely declaring that Person B had prepared the bills that became Senate Project 410 and Senate Project 471.

92. In or about the end of March 2010, after meeting with the FBI, Person B received several phone calls from Person C, during which Person C again requested that Person B prepare a sworn statement falsely declaring that Person B had prepared the bills that became Senate Project 410 and Senate Project 471.

93, In or about early 2010, including January through March, in the District of Puerto Rico, the defendant,

HECTOR MARTINEZ MALDONADO,

did knowingly attempt to intimidate, threaten, and corruptly persuade, and did knowingly engage in misleading conduct toward Person B with intent to hinder, delay, and prevent the communication to a law enforcement officer of information relating to the commission or possible commission of a Federal offense, that is, information regarding who prepared the bills that became Senate Project 410 and Senate Project 471 in connection with the FBI's investigation of bribery, as described above.

All in violation of Title 18 United States Code, Section 1512(b)(3) and 2.

A TRUE BILL.

_____

FOREPERSON

Dated June 22, 2010

JACK SMITH
Chief

By: /s/ Peter M. Koski
PETER M. KOSKI
MARC E. LEVIN
Trial Attorneys
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Filed 03/04/11]

Cr. No. 10-232 (FAB)

UNITED STATES OF AMERICA,

Plaintiff,

v.

JUAN BRAVO-FERNANDEZ [1],
HECTOR MARTINEZ-MALDONADO [2],

Defendants.

JURY INSTRUCTIONS

JURY INSTRUCTION #1
Court Instructions to the Jury

Members of the Jury:

Now that you have heard all of the evidence and the arguments of counsel, it is my duty to give you the final instructions about the law that is applicable to this case. You should use these instructions to guide you in your deliberation and decisions.

All of the instructions of law given to you by the Court – those given to you at the beginning of the trial, those given to you during the trial, and these final instructions – must guide and govern your deliberations.

It is your duty as jurors to follow the law as stated in all of the instructions of the Court and to apply

those rules of law to the facts as you find them to be from the evidence received during the trial.

Counsel have properly referred to some of the applicable rules of law in their closing arguments to you. If, however, any difference appears to you between the law as stated by counsel and that as stated by the Court in these instructions, you, of course, are to be governed by the instructions given to you by the Court.

You are not to single out any one instruction alone as stating the law, but must consider the instructions as a whole in reaching your decisions.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base any part of your verdict upon any view or opinion of the law other than that given in these instructions, just as it would be a violation of your sworn duty, as the judges of the facts, to base your verdict upon anything but the evidence received in the case.

You were chosen as jurors for this trial in order to evaluate all of the evidence received and to decide each of the factual questions presented by the allegations brought by the government in the indictment and the plea of not guilty by the defendant.

In resolving the issues presented to you for decision in this trial, you must not be persuaded by bias, prejudice, or sympathy for or against any of the parties to this case or by any public opinion.

Justice through trial by jury depends upon the willingness of each individual juror to seek the truth from the same evidence presented to all the jurors here

in the courtroom and to arrive at a verdict by applying the same rules of law as now being given to each of you in these instructions.

JURY INSTRUCTION #2

Presumption of Innocence; Proof Beyond a Reasonable Doubt

It is a cardinal principle of our system of justice that every person accused of a crime is presumed to be innocent unless and until his or her guilt is established beyond a reasonable doubt. The presumption is not a mere formality. It is a matter of the utmost importance.

The presumption of innocence alone may be sufficient to raise a reasonable doubt and to require the acquittal of a defendant. The defendants before you have the benefit of the presumption of innocence throughout the trial, and you are not to convict them of the charges against them unless you are persuaded of their guilt of that charge beyond a reasonable doubt.

The presumption of innocence until proven guilty means that the burden of proof is always on the government to satisfy you that the defendants are guilty of the crimes with which they are charged beyond a reasonable doubt. The law does not require that the government prove guilt beyond all possible doubt; only proof beyond a reasonable doubt is sufficient to convict. This burden never shifts to the defendant. It is always the government's burden to prove each of the elements of the crimes charged beyond a reasonable doubt by the evidence and the reasonable inferences to be drawn from that evidence. The defendants have the right to rely upon the failure or inability of the government to establish beyond a

reasonable doubt any essential element of a crime charged against them.

If, after fair and impartial consideration of all the evidence, you are satisfied beyond a reasonable doubt of one of or both of the defendants' guilt of a particular crime, you should vote to convict him or them of that crime.

On the other hand, if, after fair and impartial consideration of all the evidence, you have a reasonable doubt as to the one of or both of defendants' guilt of a particular crime, it is your duty to acquit him or them of that crime.

JURY INSTRUCTION #3
What Is Evidence; Inferences

The evidence you must use to decide the facts of this case consists of the sworn testimony of witnesses, both on direct examination and cross-examination, regardless of who called the witness, and the exhibits that have been received into evidence, and the matters to which the parties have stipulated or agreed.

Although you may consider only the evidence presented in the case, you are not limited in considering that evidence to the bald statements made by the witnesses or what is contained in the documents or exhibits. In other words, you are not limited solely to what you see and hear as the witnesses testify or what is contained in the documents or exhibits. You are permitted to draw from facts that you find to have been proven beyond a reasonable doubt any reasonable inferences you believe are justified in the light of common sense and personal experience.

JURY INSTRUCTION #4

Kinds of Evidence: Direct and Circumstantial

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness that the witness saw something. Circumstantial evidence is indirect evidence, that is, proof of a fact or facts from which you could draw the inference, by reason and common sense, that another fact exists, even though it has not been proven directly. You might remember the example of indirect evidence that I gave you at the beginning of the trial. Suppose you wake up in the morning, and notice it is a bright, sunny day. When you go out to get the newspaper, however, you notice that the street and sidewalk are wet. From those facts, you may infer that it rained during the night. You should consider both direct and circumstantial evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. You are to decide how much weight to give any evidence.

JURY INSTRUCTION #5

What is Not Evidence

Certain things are not evidence. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they say in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them from the evidence differ from the way the lawyers have stated them, it is your memory of them that controls.

2. Questions and objections by lawyers are not evidence. Lawyers have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by my ruling on it.

3. Anything that I have excluded from evidence or ordered stricken and instructed you to disregard is not evidence. You must not consider such items.

4. Anything you may have seen or heard when the court was not in session, including statements heard and rallies and demonstrations observed, is not evidence, even if it was said or done by the defendant or any witness. You are to decide the case solely on the evidence received at trial.

5. Anything you may have seen or heard in the media is not evidence and should not be considered by you.

6. The indictment is not evidence. This case, like most criminal cases, began with an indictment. You will have that indictment before you in the course of your deliberations in the jury room. That indictment was returned by a grand jury, which heard only the government's side of the case. I caution you, as I have before, that the fact that the defendants before you have had an indictment filed against them is no evidence whatsoever of their guilt. The indictment is simply an accusation. It is the means by which the allegations and charges of the government are brought before this court. The indictment proves nothing.

JURY INSTRUCTION #6

Number of Witnesses; Credibility of Witnesses

Whether the government has sustained its burden of proof does not depend upon the number of witnesses it has called or what witness it did or did not present, or upon the number of exhibits it has offered, but instead upon the nature and quality of the evidence presented. You do not have to accept the testimony of any witness, no matter who presented the witness, if you find that the witness is not credible. You must decide which witnesses to believe and which facts are true. To do this, you must look at all the evidence, drawing on your common sense and personal experience.

You may want to take into consideration such factors as the witnesses' conduct and demeanor while testifying; any apparent fairness or bias they may have displayed; any interest you may discern that they may have in the outcome of the case; any prejudice they may have shown; their opportunities for seeing and knowing the things about which they have testified; the reasonableness or unreasonableness of the events that they have related to you in their testimony; and any other fact or circumstance disclosed by the evidence that tends to corroborate or contradict their versions of the events.

You are to judge the credibility of all witnesses fairly and reasonably, and you are to consider any interest that each of them may have in the outcome of the case in determining the weight to be given to their testimony.

JURY INSTRUCTION #7
Impeachment by Prior Inconsistent Statement

You have heard evidence that before testifying at this trial, witnesses made statements concerning the same subject matter as their testimony at trial. If a witness made a statement concerning the same subject matter as his or her testimony in this trial, you may consider that earlier statement to help you decide how much of the witness' testimony to believe. If you find that the prior statement was not consistent with the witness' testimony at trial, then you should decide whether that affects the believability of the witness' testimony at this trial.

Jury Instruction #8
Nature of Indictment; Presumption of Innocence

The defendants have been charged by the government with violation of federal laws. The charges against the defendants are contained in the indictment. The indictment is simply the description of the charge against the defendants; it is not evidence of anything. The defendants pleaded not guilty to the charge and deny committing the crimes. They are presumed innocent and may not be found guilty by you unless all of you unanimously find that the government has proven their guilt beyond a reasonable doubt.

JURY INSTRUCTION #9
Defendants' Constitutional Right Not to Present any Evidence or to Testify

A defendant has a constitutional right not to present any evidence or to testify. No inference of guilt, or of anything else, may be drawn from the fact that Juan Bravo-Fernandez and Hector Martinez-Maldonado did not present any evidence or testify. For any of you to

draw such an inference would be wrong; indeed, it would be a violation of your oath as a juror.

JURY INSTRUCTION #10
Cautionary Note; Nature of Indictment

I want to caution you that you are here to determine from the evidence presented whether the Government has proven the defendants' guilt beyond a reasonable doubt. Hector Martinez-Maldonado and Juan Bravo-Fernandez are not on trial for any act or offense not alleged in the indictment. Neither are you called upon to return a verdict as to the guilt or innocence of any other person or persons not on trial as a defendant in this case.

The only question you must answer is whether the government has met its burden, proving beyond a reasonable doubt each element of the crimes with which the defendants have been charged in the indictment. It is not up to you to decide whether any other person is guilty of any crime. The question of the possible guilt of others should not enter your thinking when you decide whether the Government has proved beyond a reasonable doubt that the defendants committed the offenses alleged.

JURY INSTRUCTION #11
Cautionary and Limiting Instructions as to Particular Kinds of Evidence

A particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one particular purpose, and not for any other purpose. I have told you when that occurred, and instructed you on the purposes for which the item can and cannot be used. For example, on some occasions a piece of evidence was admitted to be considered only as to the charges as to either defendant Martinez or

defendant Bravo but not as to both. You must keep the limiting instructions I gave you in mind when considering the evidence in this case.

JURY INSTRUCTION #12
Defense: Theory of the Case

Both defendants have plead not guilty to all the charges filed in this case. In addition to his not guilty plea, defendant Martinez contends that all of his official actions were because he believed the legislation was good for Puerto Rico and that he took no official actions or received anything of value with a corrupt motive, and that anything of value he may have received from Juan Bravo during the trip to Las Vegas was unconnected to his taking any official actions on the projects.

In addition, defendant Martinez contends that he told Mr. Velazquez to tell the truth and that asking him to remember that Mr. Velazquez worked on or prepared the legislation was the truth of what Mr. Velazquez actually did, and that he never asked him or anyone else to ask him to lie or say anything that was not true.

In addition to his not guilty plea, defendant Bravo contends that he promoted the legislation because he believed the legislation was good for Puerto Rico and that he did not ask defendant Martinez to take any official actions or give him anything of value with a corrupt motive, and that his promoting Projects 410 and 471 had no connection to any trip to Las Vegas, and that anything of value he may have provided to defendant Martinez during the trip to Las Vegas or anything of value provided to Jorge de Castro-Font at any time were unconnected to his efforts to see Projects 410 and 471 become law.

JURY INSTRUCTION #13
Multiple Defendants — Multiple Counts

Separate crimes are charged against defendant Bravo and defendant Martinez on each count of the indictment. Each count, and the evidence pertaining to it, should be considered separately. The case of each defendant should be considered separately and individually.

JURY INSTRUCTION #14
Conspiracy, 18 U.S.C. § 371

Defendants Bravo and Martinez are accused of conspiring to commit federal crimes—specifically, the crime of bribery concerning programs receiving federal funds and the crime of traveling in interstate commerce in aid of racketeering. It is against federal law to conspire with someone to commit these crimes.

For you to find defendants Bravo and Martinez guilty of conspiracy, you must be convinced that the Government has proven each of the following things beyond a reasonable doubt:

First, that the agreement specified in the indictment, and not some other agreement or agreements, existed between at least two people to –

a. commit bribery concerning federal funds, pursuant to 18 U.S.C § 666 or

b travel in interstate commerce in aid of racketeering, pursuant to 18 U.S.C § 1952

Second, that defendants Bravo and Martinez willfully joined in that agreement; and

Third, that one of the conspirators (not necessarily one of the defendants) committed an overt

act during the period of the conspiracy in an effort to further the purpose of the conspiracy.

A conspiracy is an agreement, spoken or unspoken. The conspiracy does not have to be a formal agreement or plan in which everyone involved sat down together and worked out all the details.

But the Government must prove beyond a reasonable doubt that those who were involved shared a general understanding about the crime. Mere similarity of conduct among various people, or the fact that they may have associated with each other or discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy, but you may consider such factors.

To act "willfully" means to act voluntarily and intelligently and with the specific intent that the underlying crime be committed—that is to say, with a bad purpose, either to disobey or disregard the law—not to act by ignorance, accident or mistake. The Government must prove two types of intent beyond a reasonable doubt before defendant Bravo or defendant Martinez can be said to have willfully joined the conspiracy: an intent to agree and an intent, whether reasonable or not, that the underlying crime be committed. Mere presence at the scene of a crime is not alone enough, but you may consider it among other factors. Intent may be inferred from the surrounding circumstances.

Proof that defendant Bravo and/or defendant Martinez willfully joined in the agreement must be based upon evidence of each defendant's own words and/or actions .You need not find that defendant Bravo or defendant Martinez agreed specifically to or knew about all the details of the crime, or knew every other

co-conspirator or that he participated in each act of the agreement or played a major role, but the Government must prove beyond a reasonable doubt that he knew the essential features and general aims of the venture. Even if one or both defendants was not part of the agreement at the very start, he can be found guilty of conspiracy if the Government proves that he willfully joined the agreement later. On the other hand, a person who has no knowledge of a conspiracy, but simply happens to act in a way that furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

An "overt act" is any act knowingly committed by one or more of the conspirators in an effort to accomplish some purpose of the conspiracy. The Government is only required to prove that one overt act has been taken. The Government is not required to prove that the defendant personally committed or knew about the overt act. It is sufficient if one conspirator committed one overt act at some time during the period of the conspiracy.

The Government does not have to prove that the conspiracy succeeded or was achieved. The crime of conspiracy is complete upon the agreement to commit the underlying crime and the commission of one overt act.

JURY INSTRUCTION #15

Interstate Travel in Aid of Racketeering, 18 U.S.C. § 1952(a)(3)(A)

Defendant Bravo and defendant Martinez are separately charged with violating the Travel Act in Counts Two and Three of the Indictment, respectively. It is against federal law to travel in interstate

commerce for the purpose of carrying on certain unlawful activities.

For you to find the defendants guilty of this crime, you must be convinced that the Government has proven each of the following things beyond a reasonable doubt:

First, that the defendants traveled in interstate commerce;

Second, that they did so with the intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of an "unlawful activity," here, a violation of Federal or Puerto Rico law regarding criminal bribery; and

Third, that after the interstate travel, they performed or attempted to perform acts in furtherance of promoting, managing, establishing, carrying on, or facilitating the "unlawful activity" described previously.

"Interstate commerce" includes commerce or travel between one state. The term "State" includes a state of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States, including Puerto Rico. The elements of bribery in violation of the bribery laws of the United States – specifically, Title 18, United States Code, Section 666(a)(1)(B) and 666(a)(2) – are discussed elsewhere in these instructions. There is no requirement that the interstate travel be essential to the scheme. It is enough if the interstate travel made the unlawful activity easier.

And while it must be proven that the defendants traveled in interstate commerce with the intent to

promote, manage, establish, carry on, or facilitate an "unlawful activity," it need not be proved that such purpose was the only reason or motive prompting the defendants' travel.

"Unlawful activity" as used in counts two and three means bribery in violation of the laws of the state in which committed or of the United States.

It is a crime in Puerto Rico for anyone to "directly or through an intermediary give[] or promise[] to give money or any benefit to a public officer or employee" . . . "to perform an act that pertains to his/her regular duties." Likewise, it is a crime for "any public official or employee . . . [to] solicit or receive[] money or any benefit, or accept[] a proposal to such effects, directly or through an intermediary, for himself or a third person, to perform an act that is contrary to his/her duties."

It is sufficient under this section for the attempted act to fall within the general duties of the employee as described upon his appointment; it is not necessary to show that official had final authority in the chain of events.

JURY INSTRUCTION #16
Travel Act – Unanimity of Theory

As I will later instruct you, your verdict, whether it is guilty or not guilty, must be unanimous. The following instruction applies to the unanimity requirement as to Counts 2 and 3 concerning the Travel Act. Count 2 applies to defendant Bravo and Count 3 applies to defendant Martinez. Both counts allege that the defendant charged in that count violated the Travel Act in one of two ways. First, the government alleges that, after their interstate travel, each defendant committed the crime of Bribery

Concerning Programs Receiving Federal Funds in violation of the federal bribery laws. Second, the government alleges that, after their interstate travel, each defendant committed bribery in violation of Puerto Rico's bribery laws. In order to return a guilty verdict as to either defendant, all twelve of you must agree that the same law – either the federal bribery laws or Puerto Rico's bribery laws – was violated by that defendant. All of you must agree that the government proved beyond a reasonable doubt that the defendant charged in each count traveled in interstate commerce and afterward violated federal bribery law; or, all of you must agree that the government proved beyond a reasonable doubt that the defendant charged in each count traveled in interstate commerce and afterward violated Puerto Rico's bribery laws. In addition, for you to convict either of the defendants under any of these theories, the government must prove beyond a reasonable doubt and you must unanimously agree upon both what the defendants agreed to give and what they agree to receive as part of the exchange.

In addition, Count 2 charges defendant Bravo with violating the Travel Act based on the alleged bribes he paid to both defendant Martinez and Mr. De Castro-Font. To return a guilty verdict, all twelve of you must agree that defendant Bravo violated the Travel Act by bribing defendant Martinez and/or by bribing Jorge de Castro-Font. If all twelve of you find beyond a reasonable doubt that defendant Bravo bribed someone in violation of the Travel Act, but you are not unanimous as to whether it was defendant Martinez and/or Mr. De Castro-Font, you must acquit defendant Bravo on Count 2.

JURY INSTRUCTION #17
Travel Act – Puerto Rico Bribery (Count 2)

To establish that defendant Bravo committed the Travel Act violation alleged in Count 2 based on violations of Puerto Rico's bribery laws, the government must prove the following beyond a reasonable doubt:

First, that Mr. Bravo traveled in interstate commerce;

Second, that Mr. Bravo did so with the intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of an unlawful activity, specifically the crime of bribery in violation of the laws of Puerto Rico; and

Third, that, after this interstate travel, Mr. Bravo later performed acts in furtherance of promoting, managing, establishing carrying on or facilitating the crime of bribery in violation of the laws of Puerto Rico.

It is a crime in Puerto Rico for a public official to ask for or accept money or any benefit in exchange for performing an official act, and it is a crime in Puerto Rico to give or promise to give a public officer money or any benefit in exchange for the public officer performing an official act.

JURY INSTRUCTION #18
Travel Act – Puerto Rico Bribery (Count 3)

To establish that defendant Martinez committed the Travel Act violation alleged in Count 3 based on violations of Puerto Rico's bribery laws, the government must prove the following beyond a reasonable doubt:

First, that defendant Martinez traveled in interstate commerce;

Second, that defendant Martinez did so with the intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of an unlawful activity, specifically the crime of bribery in violation of the laws of Puerto Rico; and

Third, that, after this interstate travel, defendant Martinez later performed acts in furtherance of promoting, managing, establishing carrying on or facilitating the crime of bribery in violation of the laws of Puerto Rico.

It is a crime in Puerto Rico for a public official to ask for or accept money or any benefit in exchange for performing an official act, and it is a crime in Puerto Rico to give or promise to give a public officer money or any benefit in exchange for the public officer performing an official act.

JURY INSTRUCTION #19
Travel Act – Puerto Rico's Bribery Laws are Not Extraterritorial

Puerto Rico's bribery laws apply only to conduct that takes place within the territory of Puerto Rico. Consequently, the government must prove beyond a reasonable doubt that the bribes alleged in the indictment were offered, accepted or received within Puerto Rico, rather than someplace else.

JURY INSTRUCTION #20
Bribery Concerning Programs Receiving Federal Funds, 18 U.S.C. § 666(a)(2)

Defendant Bravo is accused of corruptly giving, offering, or agreeing to give things of value to defendant Martinez and/or Jorge de Castro-Font, with intent to influence or reward defendant Martinez

and/or De Castro-Font in connection with a business, transaction, or series of transactions of the Commonwealth of Puerto Rico government involving more than $5,000.

For you to find defendant Bravo guilty of bribery, you must be convinced that the Government has proven each of the following things beyond a reasonable doubt:

First, that defendant Bravo gave, offered, or agreed to give any thing of value to any person;

Second, that defendant Bravo did so corruptly with the intent to influence or reward an agent of the Puerto Rico government in connection with any business, transaction, or series of transactions of the Puerto Rico government;

Third, that this business, transaction, or series of transactions involved any thing of a value of $5,000 or more; and

Fourth, that the Puerto Rico government, in a one-year period preceding May 15, 2005, or during the one-year period following May 15, 2005, received benefits of more than $10,000 under any Federal program involving a grant, contract subsidy, loan, guarantee, insurance or other assistance.

An act is done "corruptly" if it is performed voluntarily, deliberately and dishonestly for the purpose of either accomplishing an unlawful end or result, or of accomplishing some otherwise lawful end or lawful result, by any unlawful method or means.

The thing of value need not have been given, offered, or promised solely with a corrupt intent to influence or reward because people rarely act for a single purpose. To find that the thing of value was given, offered, or

promised with a corrupt intent to influence or reward, you must find that defendant Bravo gave, offered, or promised the thing of value in part to corruptly influence or reward defendant Martinez for his official acts.

The term "agent" as relevant to this case means any employee, officer or director of the Puerto Rico government.

When considering the First and Second elements above, I instruct you that a defendant is not required to have given, offered, or agreed to give a thing of value before the business, transaction, or series of transactions. Rather, the Government may prove that defendant Bravo gave, offered, or agreed to give the thing of value before, after, or at the same time as the business, transaction, or series of transactions. Therefore, the Government does not need to prove that defendant Bravo gave, offered, or agreed to offer the trip to Las Vegas before defendant Martinez performed any official action or series of acts.

The Government is not required to prove that defendant Bravo gave, offered, or agreed to give the trip to Las Vegas corruptly with the intent to influence or reward a specific action by defendant Martinez. Instead it is sufficient if the Government proves beyond a reasonable doubt that defendant Bravo gave, offered, or agreed to give the trip to Las Vegas corruptly with intent to influence or reward a course of conduct by defendant Martinez. Therefore, the Government has met its burden under the First and Second elements above if you find beyond a reasonable doubt that defendant Bravo gave, offered, or agreed to give the trip to Las Vegas corruptly with the intent to influence or reward one or all of several actions taken by defendant Martinez in reference to Senate Projects

410 and/or 471, including but not limited to holding hearings, inviting defendant Bravo to testify at the committee hearings, authorizing a favorable committee report, and/or voting in favor of the legislation.

The Government is not required to prove that defendant Bravo's giving, offer, or agreement to give the trip to Las Vegas caused defendant Martinez to change his actions or course of conduct regarding Senate Projects 410 and/or 471. Therefore, the Government has met its burden under the First and Second elements if you find beyond a reasonable doubt that defendant Bravo gave, offered, or agreed to give the Las Vegas trip corruptly with the intent to influence or reward defendant Martinez to maintain a position already adopted in reference to Senate Projects 410 and/or 471 before the Las Vegas trip was given, offered, or agreed to be given.

The Government is not required to show that any business, transaction, or series of transactions was actually performed by defendant Martinez. Nor is the Government required to show that any action or series of actions actually performed by defendant Martinez was, or were, unfavorable, undesirable, or not beneficial to the citizens of Puerto Rico. The merits of the legislation are not an issue in this case, and you are instructed not to consider whether Senate Projects 410 and 471 were good or bad laws when reaching a verdict. Instead, the Government need only prove beyond a reasonable doubt that defendant Bravo gave, offered, or agreed to give the trip to Las Vegas corruptly, with an intent to influence or reward defendant Martinez.

JURY INSTRUCTION #21

Bribery Concerning Programs Receiving Federal Funds, 18 U.S.C. § 666(a)(1)(B)

Defendant Martinez is accused of corruptly soliciting or demanding for his own benefit, or accepting or agree to accept, anything of value from defendant Bravo, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of the Commonwealth of Puerto Rico government involving more than $5,000.

For you to find defendant Martinez guilty of bribery, you must be convinced that the Government has proven each of the following things beyond a reasonable doubt:

First, that defendant Martinez was an agent of the Commonwealth of Puerto Rico government whose duties included those of an elected Senator of the Commonwealth of Puerto Rico, as charged;

Second, that defendant Martinez solicited, demanded, accepted or agreed to accept anything of value from another person;

Third, that defendant Martinez did so corruptly with the intent to be influenced or rewarded in connection with some business, transaction or series of transactions of the Puerto Rico government;

Fourth, that this business, transaction or series of transactions involved anything of a value of $5,000 or more; and

Fifth, that the Puerto Rico government, in a one-year period preceding May 15, 2005, or during the one-year period following May 15, 2005, received benefits of more than $10,000 under any Federal program

involving a grant, contract subsidy, loan, guarantee, insurance or other assistance.

An act is done "corruptly" if it is performed voluntarily, deliberately and dishonestly for the purpose of either accomplishing an unlawful end or result, or of accomplishing some otherwise lawful end or lawful result by any unlawful method or means.

The thing of value need not have been solicited, demanded, or accepted solely with a corrupt intent to influence or reward because people rarely act for a single purpose. To find that the thing of value was solicited, demanded, or accepted with a corrupt intent to influence or reward, you must find that defendant Martinez solicited, demanded, or accepted the thing of value in part to corruptly influence or reward his official acts.

The term "agent" as relevant to this case means any employee, officer or director of the Puerto Rico government.

When considering the Second and Third elements above, I instruct you that a defendant is not required to have accepted or received a thing of value before the business, transaction, or series of transactions. Rather, the Government may prove that defendant Martinez solicited, demanded, accepted, or agreed to accept the thing of value before, after, or at the same time as the business, transaction, or series of transactions. Therefore, the Government does not need to prove that defendant Martinez solicited, demanded, accepted or agreed to accept the trip to Las Vegas before defendant Martinez performed any official act or series of acts.

The Government is not required to prove that defendant Martinez solicited, demanded, accepted, or agreed to accept the trip to Las Vegas corruptly with the intent to be influenced or rewarded by defendant Bravo for a specific action. Instead it is sufficient if the Government proves that defendant Martinez solicited, demanded, accepted, or agreed to accept the Las Vegas trip corruptly with the intent to be influenced or rewarded for a course of conduct. Therefore, the Government has met its burden under the Second and Third elements above if you find beyond a reasonable doubt that defendant Martinez solicited, demanded, accepted, or agreed to accept the Las Vegas trip corruptly with the intent to be influenced or rewarded for one or all of several actions taken by defendant Martinez in reference to Senate Projects 410 and/or 471, including but not limited to holding hearings, inviting defendant Bravo to testify at the committee hearings, authorizing a favorable committee report, and/or voting in favor of the legislation.

The Government is not required to prove that defendant Martinez's solicitation, demand, acceptance, or agreement to accept the trip to Las Vegas caused defendant Martinez to change his actions or course of conduct regarding Senate Project 410 and/or 471. Therefore, the Government has met its burden under the Second and Third elements if you find beyond a reasonable doubt that defendant Martinez solicited, demanded, accepted, or agreed to accept the Las Vegas trip corruptly with the intent to be influenced or rewarded for maintaining a position already adopted in reference to Senate Projects 410 and/or 471 before the Las Vegas trip was given, offered, or agreed to be given.

The Government is not required to show that any business, transaction, or series of transactions was actually performed by defendant Martinez. Nor is the Government required to show that any action or series of actions actually performed by defendant Martinez was, or were, unlawful, undesirable, or not beneficial to the citizens of Puerto Rico. The merits of the legislation are not an issue in this case, and you are instructed not to consider whether Senate Projects 410 or 471 were good or bad laws when reaching a verdict. Instead, the Government need only prove beyond a reasonable doubt that defendant Martinez solicited, demanded, accepted, or agreed to accept the trip to Las Vegas corruptly, with an intent to be influenced or rewarded.

JURY INSTRUCTION #22
Bribery

I have used the word "bribery" in these instructions. Bribery requires that the government prove beyond a reasonable doubt the existence of a *quid pro quo* or, in plain English, an agreement that the thing of value that is given to the public official is in exchange for that public official promising to perform official acts for the giver. It is not sufficient that the thing of value is made to curry favor because of the official's position or that there is some connection in time or place with an official act that is promised to the giver; rather there must be an agreement that the thing of value was offered by defendant Bravo and accepted by Senator Martinez in exchange for a promise to perform an official act.

JURY INSTRUCTION #23
Definition of "anything of value"

The phrase "anything of value" means any item, whether tangible or intangible, that the person giving or offering or the person accepting or receiving considers to be worth something. This includes things possessing intrinsic value, whether tangible or intangible, that the person giving or offering or the person accepting or receiving considers to be worth something. The phrase "anything of value" includes a sum of money, tickets to a boxing match, meals, hotel rooms, airfare, entertainment, and trips.

JURY INSTRUCTION #24
The Merits of the Legislation and the Lawfulness of Conduct is No Defense

It is not a defense to the crime of bribery "that the business, transaction or series of transactions of the Puerto Rico government," as alleged in Counts Four and Five of the Indictment, was actually lawful, desirable, or even beneficial to the citizens of Puerto Rico. Put more simply, the defendants' guilt or innocence does not depend upon whether Senate Projects 410 or 471 were good or bad laws.

JURY INSTRUCTION #25
Obstruction of Justice, 18 U.S.C. § 1512(b)(3)

Defendant Martinez is charged with knowingly using intimidation, threatening, or corruptly persuading Jose Velazquez, or engaging in misleading conduct toward Jose Velazquez, with the intent to hinder, delay, or prevent the communication to a law enforcement officer of information relating to the commission or possible commission of a Federal offense.

For you to find defendant Martinez guilty of this crime, you must be convinced that the Government has proven each of the following things beyond a reasonable doubt:

First, that on about the date charged, defendant Martinez either –

a. used intimidation, threatened, or corruptly persuaded Jose Velazquez, or

b. engaged in misleading conduct toward Jose Velazquez;

Second, that defendant Martinez did so knowingly;

Third, that defendant Martinez did so with the intent to hinder, delay, or prevent the communication to a law enforcement officer of information relating to the commission or possible commission of a Federal offense.

It is not a sufficient defense to the crime of obstruction of justice that a defendant's statement was literally true, if you find that defendant Martinez knowingly corruptly persuaded or engaged in misleading conduct toward Jose Velazquez with an intent to hinder, delay, or prevent the communication to a law enforcement officer of information relating to the commission or possible commission of a Federal offense. It is up to you to determine whether defendant Martinez knowingly corruptly persuaded or engaged in misleading conduct toward Jose Velazquez, or aided and abetted Jannisca Rodriguez, with an intent to hinder, delay, or prevent the communication to a law enforcement officer of information relating to the commission or possible commission of a Federal offense.

JURY INSTRUCTION #26

Essential Elements of the Offense Aiding and Abetting

To "aid and abet" means intentionally to help someone else commit the charged crime. To establish aiding and abetting, the government must prove beyond a reasonable doubt:

First, that someone else committed one or more of the crimes charged in counts two through six of the indictment.

Second, that the defendants consciously shared the other person's knowledge of one or more of those crimes, intended to help him or her and took part in one or more of the endeavors, seeking to make one or more of them succeed.

A defendant doesn't have to commit the crimes, be present when they are committed, or be aware of the details of their execution to be guilty of aiding and abetting. But a general suspicion that an unlawful act may occur or that something criminal is happening is not enough. Mere presence at the scene of the crimes charged in counts two through six of the indictment and knowledge that the crimes charged in counts two through six of the indictment are also not sufficient to establish aiding and abetting. But you may consider those factors among others.

JURY INSTRUCTION #27

Constitutional Right to Petition Senators for Legislation

Citizens of Puerto Rico such as defendant Bravo have a right, guaranteed by the First Amendment to the United States Constitution and by Art. II, §4 of the Constitution of the Commonwealth of Puerto Rico to petition the government for redress of grievances.

Seeking or gaining access to a legislator to address matters of concern to the citizen or to lobby for the passage of legislation is constitutionally-protected conduct and does not constitute a corrupt intent to improperly influence the legislator. However, there is no constitutional right to corruptly offer anything of value with the intent to influence or reward a legislator or a public official or employee regarding his official acts.

JURY INSTRUCTION #28
Defense: Good Faith

Because an essential element of the crimes charged is that defendants acted with a corrupt intent, good faith on the part of the defendants as to the legality of their conduct is a complete defense to the charges. The burden of proving good faith does not rest with the defendants because the defendants do not have an obligation to prove anything in this case. It is the government's burden to prove beyond a reasonable doubt that the defendants are guilty and did not act with good faith.

JURY INSTRUCTION #29
Circumstantial Proof: Knowledge, Willfulness and Intent

Knowledge, willfulness and intent involve the state of a person's mind. Medical science has not yet devised an instrument which can record what was in one's mind in the distant past. Knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what a defendant knew or intended at a particular time, you may consider any statements made or acts done or omitted by a defendant and all other facts and circumstances

received in evidence that may aid in your determination of defendants' knowledge or intent. You may infer, but you are certainly not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. Thus, knowledge may be inferred from what a defendant says or does: his or her words, his or her actions, and his or her conduct, at the time of the events in question or after.

The intent with which an act is done is often more clearly and conclusively shown by the act itself, or by a series of acts, than by words or explanations of the act uttered long after its occurrence.

Accordingly, intent, willfulness and knowledge are usually established by surrounding facts and circumstances as of the time the acts in question occurred, or the events took place, and the reasonable inferences to be drawn from them.

JURY INSTRUCTION #30
"On or About" Explained

You will note that the Indictment charges that offenses were committed "on or about" a certain date. Although it is necessary for the government to prove beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged in the Indictment, it is not necessary for the government to prove that the offense was committed precisely on the date charged.

JURY INSTRUCTION #31
Stipulations

The evidence in this case includes facts to which the lawyers have agreed or stipulated. A stipulation means simply that the Government and one or both

defendants accept the truth of a particular proposition or fact. You will have those stipulations before you in the course of your deliberations in the jury room. Because there is an agreement, there is no need for evidence apart from the stipulations. You must accept the stipulations as facts to be given whatever weight you choose to give them.

JURY INSTRUCTION #32
Consideration of Evidence

Your verdict must be based solely on the evidence and on the law as I have given it to you in these instructions. Nothing that I have said or done, however, is intended to suggest what your verdict should be. That is entirely for you to decide.

JURY INSTRUCTION #33
Punishment

The punishment provided by law for the offenses charged in the indictment is a matter exclusively within the province of the judge, and should never be considered by you in any way in arriving at an impartial verdict as to the guilt or innocence of the defendant.

JURY INSTRUCTION #34
Duty to Deliberate

Any verdict must represent the considered judgment of each one of you. In order to return a verdict it is necessary that each juror agree to it. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate in an effort to reach agreement if you can do so without compromising your individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of

the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all time that you are not partisans. You are judges – judges of the facts. Your sole interest is to determine from the evidence in this case whether the Government has proved its case beyond a reasonable doubt.

JURY INSTRUCTION #35
Communication With The Court

If it becomes necessary during your deliberations to communicate with me, you may send a note through the Court Security Officer signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me on anything concerning the case except by a signed writing, and I will communicate with any member of the jury on anything concerning the case only in writing, or orally here in open court. If you send out a question, I will consult with the parties as promptly as possible before answering it, which may take some time. You may continue with your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone, including me, how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged.

JURY INSTRUCTION #36
Return of Verdict Form

When you return to the jury room you should first select one of your members to act as your foreperson to preside over the deliberations and to be your spokesperson here in court.

You will have before you what is called the verdict form. This form is simply the written notice of the decision you will reach in this case.

After you have reached a unanimous verdict, your foreperson will fill in the verdict form, sign and date it. You will then advise the Court Security Officer, outside your door, in writing, that you have reached a unanimous verdict and are ready to return to the courtroom. After you return to the courtroom, your foreperson will deliver the completed verdict forms as directed in open court.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Filed 03/07/11]

Cr. No. 10-232 (FAB)

UNITED STATES OF AMERICA,

Plaintiff,

v.

JUAN BRAVO-FERNANDEZ [1],
HECTOR MARTINEZ-MALDONADO [2],

Defendants.

VERDICT

COUNT I

With respect to Count I, conspiracy, we the jury unanimously find defendant Juan Bravo-Fernandez:

NOT GUILTY_____ GUILTY__X__

If you find defendant Bravo-Fernandez not guilty, proceed to Count I with respect to defendant Hector Martinez-Maldonado. If you find defendant Bravo-Fernandez guilty, please answer the following questions.

Which one or more of these was the object of the conspiracy (check all that you unanimously find to apply):

To commit bribery concerning programs receiving federal funds (defendant Bravo-Fernandez's transfer of things of value to defendant Martinez-Maldonado and/or to Jorge de Castro Font):

YES__ NO_X_

To commit bribery concerning programs receiving federal funds (defendant Martinez-Maldonado's and/or Jorge de Castro-Font's solicitation or acceptance of things of value from defendant Bravo-Fernandez):

YES__ NO_X_

To travel in interstate commerce in aid of racketeering:

YES_X_ NO___

With respect to Count I, conspiracy, we the jury unanimously find defendant Hector Martinez-Maldonado:

NOT GUILTY_____ GUILTY___X___

If you find defendant Martinez-Maldonado not guilty, proceed to Count II. If you find defendant Martinez-Maldonado guilty, please answer the following questions.

Which one or more of these was the object of the conspiracy (check all that you unanimously find to apply):

To commit bribery concerning programs receiving federal funds (defendant Bravo-Fernandez's transfer of things of value to defendant Martinez-Maldonado and/or to Jorge de Castro Font):

YES__ NO_X_

To commit bribery concerning programs receiving federal funds (defendant Martinez-Maldonado's and/or Jorge de Castro-Font's solicitation or acceptance of things of value from defendant Bravo-Fernandez):

YES__ NO_X_

To travel in interstate commerce in aid of racketeering:

YES__ NO_X_

COUNT II

With respect to Count II, Interstate Travel in Aid of Racketeering, we the jury unanimously find defendant Juan Bravo-Fernandez:

NOT GUILTY_____ GUILTY___X___

If you find defendant Bravo-Fernandez not guilty, proceed to Count III. If you find defendant Bravo-Fernandez guilty, please answer the following questions.

Which one or more of these did defendant Bravo-Fernandez travel with the intent to do (check all that you unanimously find to apply):

Bribery concerning programs receiving federal funds:

YES__ NO_X_

Bribery in violation of Puerto Rico law:

YES_X_ NO___

COUNT III

With respect to Count III, Interstate Travel in Aid of Racketeering, we the jury unanimously find defendant Hector Martinez-Maldonado:

NOT GUILTY___X___ GUILTY_____

If you find defendant Martinez-Maldonado not guilty, proceed to Count IV. If you find defendant Martinez-Maldonado guilty, please answer the following questions.

Which one or more of these did defendant Martinez-Maldonado travel with the intent to do (check all that you unanimously find to apply):

Bribery concerning programs receiving federal funds:

YES___ NO___

Bribery in violation of Puerto Rico law:

YES___ NO___

COUNT IV

With respect to Count IV, Federal Program Bribery, we the jury unanimously find defendant Juan Bravo-Fernandez:

NOT GUILTY_____ GUILTY___X___

COUNT V

With respect to Count V, Federal Program Bribery, we the jury unanimously find defendant Hector Martinez-Maldonado:

NOT GUILTY_____ GUILTY___X___

COUNT VI

With respect to Count VI, Obstruction of Justice, we the jury unanimously find defendant Hector Martinez-Maldonado:

NOT GUILTY___X___ GUILTY_____

Signed: _____ Date: 03/07/11

DO NOT SIGN,
PUT ONLY YOUR JURY NUMBER

Supreme Court, U.S.
FILED
JUN 10 2016
OFFICE OF THE CLERK

No. 15-537

IN THE

Supreme Court of the United States

JUAN BRAVO-FERNANDEZ AND
HECTOR MARTÍNEZ-MALDONADO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTION PRESENTED

Whether, under *Ashe v. Swenson*, 397 U.S. 436 (1970), and *Yeager v. United States*, 557 U.S. 110 (2009), a vacated, unconstitutional conviction can strip an acquittal of its preclusive effect under the collateral estoppel prong of the Double Jeopardy Clause.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTRODUCTION	1
OPINIONS BELOW	4
JURISDICTION	4
CONSTITUTIONAL PROVISION INVOLVED	4
STATEMENT	5
SUMMARY OF ARGUMENT	11
ARGUMENT	15
I. A Jury's Acquittal Retains Preclusive Effect Under the Double Jeopardy Clause Regardless of an Inconsistent Vacated Conviction	15
A. *Ashe* Bars Re-Litigation of an Issue That an Acquittal Already Decided in the Defendant's Favor	15
B. Under *Yeager*, a Vacated Conviction Does Not Strip an Acquittal of Preclusive Effect	18
1. *Yeager* Holds That Hung Counts Are Irrelevant in the *Ashe* Analysis	19
2. Vacated Convictions Are Equally Irrelevant in the *Ashe* Analysis	20

TABLE OF CONTENTS—Continued

Page

C. *Powell* Confirms That a Vacated Conviction Cannot Strip an Acquittal of Preclusive Effect 30

1. *Powell* Holds That One Valid Verdict Cannot Impugn Another Valid Verdict 31

2. *A Fortiori*, an Invalid Conviction Cannot Impugn a Valid Acquittal . 32

3. The Government Cannot Attribute Irrationality to Jury Acquittals 35

II. A Vacated, Unconstitutional Conviction Cannot Deprive a Defendant of an Otherwise Applicable Constitutional Right 38

III. The Decision Below Invites Prosecutorial Abuse 43

A. Overcharging and Overbroad Interpretations of Criminal Statutes Are Rampant 44

B. The Decision Below Exacerbates Government Overreaching 50

CONCLUSION 52

TABLE OF AUTHORITIES

CASES — Page(s)

Alabama v. Smith,
490 U.S. 794 (1989) 27

Arizona v. Fulminante,
499 U.S. 279 (1991) 23

Ashe v. Swenson,
397 U.S. 436 (1970) ..... *passim*

Blockburger v. United States,
284 U.S. 299 (1932) 45

Bond v. United States,
134 S. Ct. 2077 (2014) 48

Boston Mun. Court v. Lydon,
466 U.S. 294 (1984) 26

Brady v. Maryland,
373 U.S. 83 (1963) 23

Bullington v. Missouri,
451 U.S. 430 (1981) 22, 26, 39, 41

Burks v. United States,
437 U.S. 1 (1978) 43

Butler v. Eaton,
141 U.S. 240 (1891) 39

Chambers v. United States,
555 U.S. 122 (2009) 48

Cleveland v. United States,
531 U.S. 12 (2000) 49

Dodrill v. Ludt,
764 F.2d 442 (6th Cir. 1985) 39

TABLE OF AUTHORITIES—Continued

Page(s)

Dunn v. United States,
284 U.S. 390 (1932) 32

Evans v. Michigan,
133 S. Ct. 1069 (2013) 9, 11, 34

Fiswick v. United States,
329 U.S. 211 (1946) ..... *passim*

Foster v. Chatman,
— S. Ct. — (2016) 23

Garces v. U.S. Att'y Gen.,
611 F.3d 1337 (11th Cir. 2010) 41

Gentry v. Deuth,
456 F.3d 687 (6th Cir. 2006) 41

Gideon v. Wainwright,
372 U.S. 335 (1963) 23

Green v. United States,
355 U.S. 184 (1957) 43, 48, 51

Johnson v. Mississippi,
486 U.S. 578 (1988) 40, 43

Johnson v. United States,
544 U.S. 295 (2005) 41

Jones v. United States,
526 U.S. 227 (1999) 34

Jones v. United States,
529 U.S. 848 (2000) 48, 49

Lafler v. Cooper,
132 S. Ct. 1376 (2012) 45, 46

TABLE OF AUTHORITIES—Continued

Page(s)

Loper v. Beto,
405 U.S. 473 (1972) 40

N. Carolina v. Pearce,
395 U.S. 711 (1969) 13, 22

Neder v. United States,
527 U.S. 1 (1999) 22

People v. Wilson,
852 N.W.2d 134 (Mich. 2014) 40

Poland v. Arizona,
476 U.S. 147 (1986) 22, 39

Pollard v. United States,
352 U.S. 354 (1957) 41

Price v. Georgia,
398 U.S. 323 (1970) 30

Quercia v. United States,
289 U.S. 466 (1933) 23

Richardson v. United States,
468 U.S. 317 (1984) 24, 25

Rose v. Clark,
478 U.S. 570 (1986) 23

Sibron v. New York,
392 U.S. 40 (1968) 41

Simpson v. Motorists Mut. Ins. Co.,
494 F.2d 850 (7th Cir. 1974) 40

Skilling v. United States,
561 U.S. 358 (2010) 48

TABLE OF AUTHORITIES—Continued

Page(s)

Strickland v. Washington,
466 U.S. 668 (1984) 23

Sullivan v. Louisiana,
508 U.S. 275 (1993) 23

Tibbs v. Florida,
457 U.S. 31 (1982) 34

United States v. Anderson,
783 F.3d 727 (8th Cir. 2015) 47

United States v. Armstrong,
517 U.S. 456 (1996) 45

United States v. Crowell,
374 F.3d 790 (9th Cir. 2004) 41, 42

United States v. DiFrancesco,
449 U.S. 117 (1980) 34

United States v. Flanders,
752 F.3d 1317 (11th Cir. 2014) 48

United States v. Garcia,
754 F.3d 460 (7th Cir. 2014) 47

United States v. Goyal,
629 F.3d 912 (9th Cir. 2010) 49

United States v. Martin Linen Supply Co.,
430 U.S. 564 (1977) 1, 16, 34

United States v. Morgan,
346 U.S. 502 (1954) 41

United States v. Newman,
773 F.3d 438 (2d Cir. 2014) 49

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Olano,
507 U.S. 725 (1993) 23

United States v. Oppenheimer,
242 U.S. 85 (1916) 40

United States v. Powell,
469 U.S. 57 (1984) ..... *passim*

United States v. Russell,
221 F.3d 615 (4th Cir. 2000) 40

United States v. Scott,
437 U.S. 82 (1978) 34

Yates v. United States,
135 S. Ct. 1074 (2015) 48

Yeager v. United States,
557 U.S. 110 (2009) ..... *passim*

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V. 4

STATUTES

18 U.S.C. § 371 6

18 U.S.C. § 666 ..... *passim*

18 U.S.C. § 1512(b)(3) 6

18 U.S.C. § 1952(a)(3)(A) 6

28 U.S.C. § 1254(1) 4

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page(s)

Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50 (1968) 45, 46

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Federal Judicial Caseload Statistics (Mar. 31, 2014), Table D-4, http://www.uscourts.gov/file/10657/download 50

John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Legal Memorandum (Heritage Foundation), June 16, 2008 44

Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. Crim. L. & Criminology 643 (2006) 44, 45

Restatement (Second) of Judgments § 27 39

Tim Wu, American Lawbreaking, Slate (Oct. 14, 2007), http://goo.gl/AFsWXl 45

TABLE OF AUTHORITIES—Continued

Page(s)

U.S. Gov't Accountability Off., GAO-04-422, Report to Congressional Requesters, U.S. Attorneys: Performance-Based Initiatives Are Evolving (2004) 47

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INTRODUCTION

Respect for a jury's acquittal is "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). When a jury renders a verdict of not guilty, the Double Jeopardy Clause treats that verdict as a sacrosanct, final judgment, immune from any subsequent impeachment. Half a century ago, the Court held that this immunity does not simply bar a second prosecution on the exact charge of which a defendant was acquitted. In *Ashe v. Swenson*, 397 U.S. 436 (1970), this Court construed the Double Jeopardy Clause to incorporate a rule of collateral estoppel, barring a second prosecution on any charge that depends on a fact necessarily decided in the defendant's favor by an earlier acquittal. This case is about the reach of *Ashe*'s collateral estoppel rule.

In 2011, a jury acquitted petitioners Juan Bravo-Fernandez and Hector Martínez-Maldonado of conspiring and traveling to violate 18 U.S.C. § 666, which prohibits bribery involving a federal program. The acquittals, it is undisputed, logically depended on a jury finding that petitioners did not violate § 666; petitioners did not contest any other element of the charges. Thus, under a straightforward application of *Ashe*, the acquittals preclude any second prosecution for violating § 666.

The government nonetheless seeks to persuade a second jury, at a second trial, that petitioners violated § 666. And the First Circuit held that it could. Here is why: In addition to acquitting petitioners of conspiring and traveling to violate § 666, the jury at the 2011 trial convicted them of standalone § 666 charges. In 2013, those convictions were vacated as

unconstitutional, because the district court's instructions had invited the jury to convict based on conduct that does not actually violate § 666. But in the First Circuit's view, the vacated, unlawful convictions were still a relevant part of the *Ashe* analysis, *i.e.*, part of what the jury necessarily determined at trial. The court held that the vacated convictions were inconsistent with the acquittals and thus stripped the acquittals of any preclusive effect under *Ashe*.

If this all sounds familiar, it should. In *Yeager v. United States*, 557 U.S. 110 (2009), this Court held that an inconsistent hung count does not strip a simultaneously rendered acquittal of its preclusive effect. Because hung counts are legal nullities, *Yeager* held, they are totally irrelevant in the *Ashe* analysis. This case is *Yeager* all over again—just substitute "vacated convictions" for "hung counts." Vacated convictions are legal nullities every bit as much as hung counts. Collateral estoppel applies only to valid and final judgments, and vacated convictions, like hung counts, are neither. If the government cannot use hung counts to strip acquittals of preclusive effect, it cannot use vacated convictions either. All that matters is the acquittals, and the Double Jeopardy Clause does not allow the government to look beyond their four corners. The government does not get to try to prove at a second trial what the jury rejected at the first.

Not only is *Yeager* controlling, but the government's position in this case is antithetical to a fair system of criminal justice. The government should never benefit from having obtained an unlawful conviction. This Court held 70 years ago that a defendant whose conviction has been vacated "must stand in the position of any man who has been accused of a crime

but not yet shown to have committed it"—no collateral consequences can flow from the vacated conviction. *Fiswick v. United States*, 329 U.S. 211, 223 (1946). A vacated, unconstitutional conviction certainly cannot deprive defendants of *other* constitutional rights.

The decision below would also encourage the very prosecutorial abuses that *Ashe* and *Yeager* sought to stamp out. Overlapping, duplicative charges have become an epidemic. They pressure defendants to take pleas and dramatically increase the odds of at least one conviction when cases go to trial. Collateral estoppel exists to prevent this sort of abuse. But under the decision below, prosecutors could bring duplicative charges without fear of consequence, secure in the knowledge that a split jury decision would eliminate the preclusive effect of any acquittal and pave the way for a retrial—a retrial that double jeopardy would forbid had the government started with a compact indictment. And where the government has a weak case, the decision below creates perverse incentives to pursue a conviction on an unlawfully broad theory rather than risk a hung count under proper instructions, because a vacated conviction would allow the government to try again.

This prosecution well illustrates the point. The government piled duplicative charge on top of duplicative charge, and, to boot, advocated an erroneously expansive interpretation of § 666. The result was four acquittals and two unconstitutional convictions. Then the government successfully opposed release pending appeal, so petitioners spent a combined 18 months in a federal penitentiary. Worse, the government also charged petitioners with violating other statutes that had been repealed. Fortunately for petitioners, the district court corrected that mistake—but only after

petitioners stood trial, and were convicted, for offenses that the legislature had eliminated.

Once was enough. The Double Jeopardy Clause prevents the government from asking a second jury, at a second trial, to part ways with the jury that acquitted petitioners in 2011. The government overcharged this case, overreached with the jury instructions at the first trial, and forced petitioners to serve significant prison time despite the absence of a valid conviction. This is hardly the case for retreating from *Ashe* and *Yeager* and making the government better off because it secured an unconstitutional conviction instead of a hung jury.

OPINIONS BELOW

The First Circuit's opinion is reported at 790 F.3d 41 and reproduced at Pet. App. 1a-40a. The district court's opinion is reported at 988 F. Supp. 2d 191 and reproduced at Pet. App. 41a-53a.

JURISDICTION

The First Circuit issued its decision on June 15, 2015. Pet. App. 1a. Petitioners filed a timely petition for rehearing en banc, which the court denied on July 27, 2015. Pet. App. 134a-135a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

STATEMENT

1. On June 22, 2010, a federal grand jury indicted petitioners Bravo and Martínez on a series of multiple, overlapping bribery-related charges in connection with their trip to a Las Vegas boxing match in May 2005. Bravo is the president of a private security firm in Puerto Rico, and Martínez was then a member of the Puerto Rico senate. The government alleged that Bravo paid some of Martínez's and another Puerto Rico senator's expenses for the trip in connection with the senators' support of two uncontroversial bills related to the security industry in Puerto Rico. Pet. App. 3a, 61a-63a. Those expenses—totaling perhaps a few thousand dollars—included Martínez's plane ticket, both senators' tickets to the boxing match, a single dinner, Martínez's hotel room one of the two nights in Las Vegas, and both senators' rooms at a Marriott hotel in Florida when their flight home laid over. *Id.*

Notwithstanding the government's theory that Bravo intended the trip as a bribe, the second senator paid for his own hotel room both nights in Las Vegas, and for Martínez's room the second night. *Id.* at 62a. The jury heard evidence that Bravo had invited Martínez only as a last-minute replacement because one of Bravo's friends was hospitalized after a motorcycle accident and had to cancel. COA Joint App. 257-58. And Martínez had already supported the proposed legislation before he even heard about the trip. Pet. App. 90a; COA Joint App. 279. The Puerto Rico senate passed the bills by votes of 26-1 and 24-1. COA Joint App. 246, 250.

2. The government charged petitioners with a panoply of federal crimes based on this two-day trip: committing federal program bribery, in violation of 18

U.S.C. § 666; conspiring to violate § 666, in violation of 18 U.S.C. § 371; traveling in interstate commerce to further violations of § 666, in violation of 18 U.S.C. § 1952(a)(3)(A); traveling in interstate commerce to further violations of Puerto Rico bribery statutes, also in violation of § 1952(a)(3)(A); and conspiring to travel in interstate commerce in aid of racketeering (*i.e.*, the alleged bribery), also in violation of § 371. Pet. App. 3a-4a, 63a. The government also charged Martínez with obstruction of justice, in violation of 18 U.S.C. § 1512(b)(3). Pet. App. 63a.

At the government's urging and over petitioners' objection, the court instructed the jury that § 666 criminalizes not only *quid pro quo* "bribes" in which a person gives "something of value *in exchange* for an official act," but also mere "gratuities" in which a person gives "a reward ... *for a past act that [a public official] has already taken.*" *Id.* at 88a-89a. Two instructions "told the jury that Bravo could be convicted under § 666 for agreeing to give Martínez a gratuity, and that Martínez could be convicted under § 666 for agreeing to accept the same." *Id.* at 89a. A third instruction told the jury that "the government need not prove that Bravo offered or agreed to give Martínez anything of value before the transaction that was the subject of the 'payment' took place, and that it is sufficient for conviction to show that Bravo 'offered, or agreed to give the thing of value *after* the transaction.'" *Id.* (alterations omitted). The government's closing argument further invited the jury to convict on the theory that Bravo paid Martínez a gratuity in violation of § 666 by "emphasizing that 'it doesn't matter if the trip was offered after official acts were taken.'" *Id.* (alterations omitted).

On March 7, 2011, after a three-week trial, the jury acquitted Bravo and Martínez of conspiring to violate § 666. The jury likewise acquitted them of traveling in interstate commerce to further a violation of § 666. But the jury convicted both petitioners on the standalone § 666 charges. The jury also convicted Bravo of conspiring to travel in interstate commerce to further "unspecified 'racketeering' activity," and traveling in interstate commerce to further a violation of Puerto Rico bribery statutes. The jury acquitted Martínez of those interstate travel offenses. The jury also acquitted Martínez of obstruction. *Id.* at 4a, 64a.

The district court granted Bravo's motion for judgment of acquittal on the charge of traveling in interstate commerce to further a violation of Puerto Rico bribery statutes, because the Puerto Rico legislature had repealed those bribery statutes before petitioners traveled to Las Vegas. *Id.* at 110a-111a.

On March 1, 2012, the district court sentenced each petitioner to 48 months in prison, and imposed a fine of $175,000 on Bravo and $17,500 on Martínez. The government opposed petitioners' motions for bail pending appeal, and the district court denied those motions. As a result, Martínez began serving his sentence on March 1, 2012, and Bravo began serving his sentence on May 7, 2012. Pet. App. 64a & n.4.

3. On June 26, 2013, the First Circuit reversed or vacated each remaining conviction. Pet. App. 4a, 60a. Key here, the court vacated Bravo and Martínez's convictions on the standalone § 666 charges, because they resulted from unlawful jury instructions. *Id.* at 5a, 81a-105a. The court held that § 666 criminalizes only *quid pro quo* "bribes," not mere "gratuities." *Id.* at 102a-103a. The district court's instructions, however, "improperly invited the jury to convict both

Martínez and Bravo for conduct involving gratuities rather than bribes." *Id.* at 104a. Likewise, "the government's closing argument improperly invited the jury to convict the [petitioners] on the proscribed 'gratuity theory.'" *Id.* The court rejected the government's argument that the error was harmless, because "the evidence presented at trial could support a finding that the 'payment' Bravo gave and Martínez received constituted a gratuity." *Id.* at 104a-105a. The § 666 convictions—premised on erroneous instructions that permitted the jury to find guilt based on lawful conduct—thus "violate[d] due process." *Id.* at 105a (quoting *Fiore v. White*, 531 U.S. 225, 228 (2001)).

The court also reversed Bravo's conviction for conspiring to travel in interstate commerce to further "'racketeering' activity." *Id.* at 4a, 108a-120a. The only predicate "racketeering activity" the government had identified was bribery in violation of § 666 and Puerto Rico law, *id.* at 109a, but the Puerto Rico law had been repealed, and the court could not discern which predicate the jury had accepted, *id.* at 116a-117a. The government sought a remand to retry Bravo on a conspiracy-to-travel-to-violate-§-666 charge. But the collateral estoppel prong of the Double Jeopardy Clause, the court held, precluded retrial. The jury had acquitted Bravo of conspiring and traveling to violate § 666, and those acquittals, the court held, "necessarily decided" that Bravo did not conspire to travel to violate § 666. *Id.* at 118a-120a. At the time, the government did not argue that the inconsistent vacated convictions on the standalone § 666 charges stripped the acquittals on the conspiracy and travel charges of preclusive effect.

After oral argument but before issuing a decision, the First Circuit ordered the petitioners' release on

bail. In the meantime, Bravo served 8 months in prison and Martínez served 10 months in prison on the basis of the unlawful convictions. *Id.* at 64a-65a n.4.

4. On October 23, 2013, the First Circuit issued its mandate. Two days later, the district court entered a line order granting Bravo and Martínez a "judgment of acquittal" on all counts. Pet. App. 5a-6a. Later the same day, at the government's request, the court vacated its line order, noting that the First Circuit had not reversed, but only vacated, the convictions on the standalone § 666 charges. *Id.* at 6a. The district court denied petitioners' motion to reinstate the acquittals on the ground that the Double Jeopardy Clause barred the court from retracting them under *Evans v. Michigan*, 133 S. Ct. 1069 (2013). Pet. App. 37a, 54a-58a.

Thereafter, petitioners moved to preclude retrial of the § 666 charges under the Double Jeopardy Clause's separate collateral estoppel prong. Petitioners argued that collateral estoppel barred retrial on those charges, because a rational jury could not have acquitted petitioners of conspiring and traveling to violate § 666 without necessarily deciding that they did not violate § 666. The court denied the motions. Pet. App. 41a-53a.

5. The court of appeals affirmed. Petitioners argued—and the government did not dispute—that, standing alone, the jury's acquittals on the charges of conspiring to violate § 666 and traveling to violate § 666 necessarily depended on a finding that neither petitioner violated § 666. Pet. App. 12a-15a & n.5. In other words, "a rational jury could [not] have grounded its verdict upon an[y] [other] issue." *Ashe v. Swenson*, 397 U.S. 436, 444 (1970). Under an ordinary double jeopardy analysis, petitioners urged, the Fifth

Amendment prohibited the government from re-prosecuting petitioners on the standalone § 666 charges.

But the court of appeals held that the Double Jeopardy Clause did not bar retrial. The court reasoned that the § 666 convictions—which were vacated because they were obtained unlawfully, in violation of the Due Process Clause—divested petitioners of their double jeopardy rights. Pet. App. 15a-33a. The vacated convictions, the court stated, were "part of what the jury did decide at trial" and factored into the double jeopardy analysis. *Id.* at 18a-20a. The court relied on *United States v. Powell*, 469 U.S. 57 (1984), which held that in a single trial, a defendant cannot challenge a valid conviction on the ground that it was inconsistent with a simultaneously rendered acquittal. The court of appeals explained that the vacated convictions here were inconsistent with the acquittals because a rational jury could not have acquitted petitioners of conspiring and traveling to violate § 666 without also acquitting them of the standalone § 666 charges. The court thus held that the vacated convictions "strip the acquittals ... of collateral estoppel effect." Pet. App. 15a.

The First Circuit acknowledged *Yeager*'s holding that an acquittal retains its preclusive effect even if the jury acted inconsistently and irrationally in acquitting on some counts but hanging on others. *Id.* at 17a-18a. Because "a jury speaks only through its verdict" and not through hung counts, *Yeager* held, hung counts are irrelevant in assessing what the jury necessarily decided in an *Ashe* analysis. *Id.* at 18a (quoting *Yeager*, 557 U.S. at 121-22). But the court below deemed vacated convictions "meaningfully different" from hung counts, because "vacated

convictions, unlike hung counts, *are* jury decisions, through which the jury *has* spoken." *Id.* at 17a-18a.

The First Circuit recognized that its holding was inconsistent with its 2013 decision holding that petitioners' acquittals barred re-prosecution on the conspiracy-to-travel-to-violate-§-666 charges. The court explained that the government in the first appeal had not raised, and so the court "did not address" at that time, whether the vacated § 666 convictions strip the acquittals of preclusive effect. Pet. App. 35a.[1]

SUMMARY OF ARGUMENT

Acquittals retain their preclusive effect under the Double Jeopardy Clause even if they appear inconsistent with the same jury's vacated, unlawful conviction.

I. Under a straightforward application of the double jeopardy collateral estoppel rule of *Ashe v. Swenson*, 397 U.S. 436 (1970), the jury's acquittals at the original trial preclude the government from retrying petitioners for violating 18 U.S.C. § 666. Under *Ashe*, the government may not re-litigate an issue that an earlier jury's acquittal necessarily decided in the defendant's favor. Double jeopardy applies unless "a rational jury" could have grounded its verdict of acquittal on an issue other than the one the defendant seeks to preclude. *Ashe*, 397 U.S. at 444. Here, the jury acquitted petitioners of both conspiring to violate § 666 and traveling in interstate commerce to violate § 666. The "single rationally conceivable issue in

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[1] The First Circuit also rejected petitioners' separate double jeopardy argument based on *Evans*, 133 S. Ct. 1069. This Court denied certiorari with respect to that question.

dispute," *id.* at 445, was whether petitioners violated § 666, and the acquittals necessarily determined that they did not. The acquittals accordingly preclude the government from trying to convince a second jury, at a second trial, that petitioners violated § 666.

The acquittals do not lose their preclusive effect because they may be inconsistent with the jury's vacated, unconstitutional convictions on the stand-alone § 666 charges. In *Yeager v. United States*, 557 U.S. 110 (2009), this Court held that an acquittal retains its preclusive effect despite any inconsistency with a hung count. The court rejected the notion that hung counts are part of the record of the prior trial for purposes of the *Ashe* analysis. Rather, *Yeager* held, the *Ashe* analysis considers only valid and final verdicts through which the jury expresses its judgment in a manner that is entitled to respect. Hung counts are irrelevant because they are not valid jury decisions that have ever been accorded respect; because they are insignificant nonevents for purposes of the continuing jeopardy aspect of double jeopardy; and because it is impossible to decipher what a hung count represents.

All this is true of invalid, vacated convictions, and *Yeager* therefore controls this case. Vacated convictions are the antithesis of valid, final verdicts. They are legal nullities that command no respect. They are equally insignificant for purposes of continuing jeopardy. And it is impossible to decipher what the vacated convictions represent, because petitioners received a fundamentally flawed trial tainted by faulty instructions.

United States v. Powell, 469 U.S. 57 (1984), confirms that a vacated conviction cannot strip an acquittal of preclusive effect. *Powell* held that, in a single trial, a

defendant cannot overturn a jury's valid conviction on one count as inconsistent with the same jury's valid acquittal on another count. The First Circuit extended *Powell* to hold that, because the jury acted inconsistently by acquitting on some counts but failing to acquit on others, collateral estoppel does not bar retrial. But *Powell* means that even a valid verdict cannot be used to second-guess the soundness of another valid verdict. If this is so, *Yeager* explained, then, *a fortiori*, a hung count cannot be used to second-guess the soundness of a valid verdict of acquittal. Neither can an *invalid* verdict. Using an invalid conviction to impugn an acquittal—the most sacrosanct verdict of all—manages to offend just about every principle of double jeopardy.

II. Allowing an unconstitutional conviction to deprive petitioners of other constitutional guarantees would contravene a foundational principle of American jurisprudence—that when a conviction is vacated, it is "wholly nullified and the slate wiped clean." *N. Carolina v. Pearce*, 395 U.S. 711, 721 (1969). To our knowledge, this Court has never held that a vacated conviction can be used against a defendant for any purpose. Vacated convictions are irrelevant for purposes of civil collateral estoppel. Vacated convictions cannot be used to impeach a criminal defendant, to establish an aggravating circumstance supporting the death penalty, to enhance a sentence, or to trigger immigration consequences. In short, vacated convictions stand for nothing, and the government offers no legitimate reason to depart from that rule here.

III. The First Circuit's decision invites all the prosecutorial abuses that *Ashe*'s collateral estoppel rule is designed to prevent. Collateral estoppel

mitigates "the potential for unfair and abusive prosecutions" stemming from prosecutors' ability to "spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Ashe*, 397 U.S. at 445 n.10. The depth and breadth of the criminal code gives prosecutors extraordinary power to bring overlapping, duplicative charges. And prosecutors have strong incentives to do so, because multiple charges increase the government's leverage in plea-bargaining and raise the odds of at least one conviction at a trial. Exacerbating the problem is the government's penchant for advocating erroneously expansive interpretations of criminal statutes and then, after a conviction is vacated, seeking to force the defendant to stand trial a second time under a proper interpretation of the statute. The prosecutions here are illustrative of these abuses.

If upheld, the decision below would encourage prosecutors to bring overlapping charges and push far-reaching interpretations of criminal statutes. Prosecutors could overcharge cases without fear of consequence, because in the event of a split jury decision the inconsistency would eliminate the preclusive effect of any acquittals. And if the government is better off with a vacated conviction than a hung count, prosecutors may take shortcuts—like pursuing convictions on unlawfully broad theories—rather than play it straight and risk a hung jury. This Court should reject any rule that puts the thumb on the scale of unlawful convictions.

ARGUMENT

I. A Jury's Acquittal Retains Preclusive Effect Under the Double Jeopardy Clause Regardless of an Inconsistent Vacated Conviction

If the Double Jeopardy Clause means anything, it means that acquittals are sacrosanct. Here, a jury acquitted petitioners of two bribery charges: conspiring and traveling to commit federal program bribery under 18 U.S.C. § 666. Under *Ashe v. Swenson*, 397 U.S. 436 (1970), those acquittals logically depended on a finding that petitioners did not commit bribery in violation of § 666, and the acquittals therefore preclude the government from re-prosecuting petitioners for violating § 666. And under *Yeager v. United States*, 557 U.S. 110 (2009), and *United States v. Powell*, 469 U.S. 57 (1984), the acquittals retain their preclusive effect despite any inconsistency with the jury's vacated, unconstitutional convictions on the standalone § 666 charges. The Double Jeopardy Clause thus protects petitioners from a second trial aimed at convincing a second jury to convict where the first jury acquitted.

A. *Ashe* Bars Re-Litigation of an Issue That an Acquittal Already Decided in the Defendant's Favor

A straightforward application of the collateral estoppel rule of *Ashe v. Swenson* precludes the government from retrying petitioners on the charge that they violated 18 U.S.C. § 666.

Ashe "squarely held that the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager*, 557 U.S. at 119.

This collateral estoppel protection secures the finality and sanctity of acquittals, "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). "For whatever else [the double jeopardy] guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time." *Ashe*, 397 U.S. at 445-46 (quoting *Green v. United States*, 355 U.S. 184, 190 (1957)) (citation omitted). That protection would erode entirely without the doctrine of collateral estoppel. The "extraordinary proliferation of overlapping and related statutory offenses" over the last century has permitted "prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Id.* at 445 n.10. As a result, the "potential for unfair and abusive re-prosecutions [has] bec[o]me far more pronounced." *Id.*

The relevant question for double jeopardy collateral estoppel purposes, *Ashe* held, is whether an "issue of ultimate fact has once been determined by a valid and final judgment." *Id.* at 443. Courts accordingly must "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* at 444 (internal quotation marks omitted). In conducting this inquiry, courts must assume that the jury acted rationally in acquitting. Courts accordingly may not deny preclusive effect to an acquittal on the theory that the jury may have acted irrationally, for example, by "disbeliev[ing] substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest." *Id.* at 444 n.9 (internal quotation marks omitted). In

other words, we take a jury's acquittal at face value, full stop.

The jury in *Ashe* acquitted the defendant of robbing a participant in a poker game, and the government later sought to prosecute him for robbing a second participant in the same game. *Id.* at 439-40. But the "single rationally conceivable issue in dispute" at the first trial "was whether the [defendant] had been one of the robbers," and thus, assuming the jury acted rationally, the acquittal necessarily decided that he was not. *Id.* at 445. The Court held that the Double Jeopardy Clause barred the subsequent prosecution because the state could not "constitutionally hale him before a new jury to litigate that issue again." *Id.* at 446.

Likewise here. The jury acquitted petitioners of conspiring to violate § 666 and traveling to violate § 666. Each acquittal is a "valid and final judgment." *Ashe*, 397 U.S. at 443. Although the court of appeals did not decide the issue, the government did not dispute below that the acquittals, viewed in isolation, necessarily determined that petitioners did not commit the predicate offense of bribery under § 666. Pet. App. 12a-15a & n.5. Nor has the government disputed the point in this Court. *See* Pet. for Certiorari 7, 24; Brief in Opposition 12-23. And for good reason. The "single rationally conceivable issue in dispute," *Ashe*, 397 U.S. at 445, was whether petitioners committed bribery in violation of § 666. There was no dispute that petitioners agreed to go, and in fact traveled, to Las Vegas. The acquittals thus necessarily rested upon the jury's determination that petitioners did not violate § 666. In other words, "a rational jury could [not] have grounded its verdict upon an[y] [other] issue." *Id.* at 444. Thus, under *Ashe*, the Double

Jeopardy Clause precludes the government from attempting to convince a second jury that petitioners violated § 666.

B. Under *Yeager*, a Vacated Conviction Does Not Strip an Acquittal of Preclusive Effect

The First Circuit held that "the vacated convictions on the standalone § 666 [counts] ... strip the acquittals on the conspiracy and Travel Act counts involving § 666 of collateral estoppel effect." Pet. App. 15a. Seizing on *Ashe*'s direction to "undertake a 'practical' analysis based on the 'record' of the prior proceeding, and with an 'eye to all the circumstances of the proceedings,'" the court held that "the vacated convictions [were] part of [the] collateral estoppel inquiry," *id.* at 16a—*i.e.*, part of what the jury decided at trial. If the jury's acquittals decided that petitioners did not commit the predicate § 666 violations, the court continued, the jury could not rationally have convicted petitioners of the standalone § 666 charges. *Id.* at 31a-33a. Those vacated convictions, the court stated, "make unanswerable *Ashe*'s question about what the jury necessarily decided in rendering the acquittal." *Id.* at 11a. The court thus held that double jeopardy did not bar re-prosecution under § 666. The government echoes this reasoning, arguing that the vacated constitutions are part of the record of the prior proceeding. Brief in Opposition 13-14, 16. The government thus urges that a court "need not shut its eyes" to a conviction that, though invalid, may demonstrate that the jury was not acting rationally. *Id.* at 16.

But this is precisely the chain of reasoning that this Court rejected in *Yeager*. *Yeager* held that acquittals retain their preclusive effect under *Ashe* even if the jury acted inconsistently in hanging on other counts. Hung counts, *Yeager* held, are not a relevant part of

the "record" for purposes of the *Ashe* analysis. *Yeager* is indistinguishable in all material respects from this case, as vacated convictions are legal nullities every bit as much as hung counts. If anything, the government's attempt to infect the collateral estoppel analysis with a vacated, unconstitutional conviction is even more pernicious than the government's reliance on the hung count in *Yeager*.

1. *Yeager* Holds That Hung Counts Are Irrelevant in the *Ashe* Analysis

The defendant in *Yeager* was charged with numerous crimes, including securities fraud, wire fraud, and insider trading. The jury acquitted Yeager of the fraud counts but hung on the insider trading counts, and the government sought a retrial on the insider trading counts. 557 U.S. at 114-15. But a rational jury could not have acquitted Yeager of fraud without concluding that he "lacked insider information," an issue crucial to the insider trading counts as well. *Id.* at 120. The Fifth Circuit thus concluded that, "[v]iewed in isolation, ... the acquittals on the fraud charges would preclude retrial" on the hung insider trading counts. *Id.*

The Fifth Circuit nonetheless "refused to find the Government precluded from pursuing the hung counts in a new prosecution." *Id.* at 121. The court reasoned that "the hung counts must be considered to determine what issues the jury decided in the first trial," and "[v]iewed alongside the hung counts, ... the acquittals appeared less decisive." *Id.* at 120. "[I]f the jury found that [the defendant] did not have insider information, then the jury, acting rationally, would also have acquitted [him] of the insider trading counts." *Id.* at 120-21 (quotation marks omitted). "The fact that the jury hung was a logical wrinkle that made it

impossible," the Fifth Circuit concluded, "to decide with any certainty what the jury necessarily determined." *Id.* at 121.

This Court reversed. "[T]he interest in preserving the finality of the jury's judgment on the [acquitted] counts," the Court held, "bars a retrial on the [hung] counts." *Yeager*, 557 U.S. at 118. The "jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it," and the acquittal's "finality is unassailable." *Id.* at 122-23. By contrast, "the consideration of hung counts has no place in the issue-preclusion analysis." *Id.* at 122.

For multiple reasons, the Court held, "[a] hung count is not a 'relevant' part of the 'record of [the] prior proceeding'" for purposes of the *Ashe* analysis. *Id.* at 121 (quoting *Ashe*, 397 U.S. at 444). First, juries do not "speak[]" through hung counts, and hung counts accordingly get no "respect as a matter of law or history." *Id.* at 121, 125. Second, hung counts are irrelevant "nonevents" for double jeopardy purposes because they do not terminate jeopardy. *Id.* at 118, 120, 123-24. Third, "there is no way to decipher what a hung count represents." *Id.* at 121. In sum, because the jury's acquittals for fraud, "viewed in isolation," meant that the jury had necessarily decided that Yeager lacked insider information, *Ashe*'s collateral estoppel rule barred the government from retrying him for insider trading. *Id.* at 120-21.

2. Vacated Convictions Are Equally Irrelevant in the *Ashe* Analysis

If hung counts are irrelevant under *Ashe*'s collateral estoppel analysis, so too are vacated convictions. Neither hung counts nor vacated convictions have the

"unassailable" finality of a jury's acquittal. *Yeager*, 557 U.S. at 123. Each and every criticism that *Yeager* directed at hung counts applies with equal or greater force to vacated convictions. Thus, under the Double Jeopardy Clause, an acquittal retains its full preclusive effect, without regard to an unconstitutional conviction.

a. A hung count disappears in the *Ashe* analysis, *Yeager* reasoned, because "hung counts have never been accorded respect as a matter of law or history." *Yeager*, 557 U.S. at 124 (quoting *Powell*, 469 U.S. at 67). "To identify what a jury necessarily determined at trial, courts should scrutinize a jury's decisions, not its failures to decide." *Id.* at 122. "Because a jury speaks only through its verdict, its failure to reach a verdict cannot—by negative implication—yield a piece of information that helps put together the trial puzzle" as to what the first jury determined. *Id.* at 121. Hung counts "are not similar to jury verdicts in any relevant sense." *Id.* at 124.

Yeager necessarily presumed that the "jury verdicts" from which hung counts fundamentally differed were valid and final jury verdicts. Indeed, *Yeager* explained that *Ashe*'s collateral estoppel rule springs only from a "valid and final" judgment. *Yeager*, 557 U.S. at 119. That is the only kind of verdict that "'brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality.'" *Id.* at 124 (quoting *Powell*, 469 U.S. at 67).

Vacated convictions are, by definition, the antithesis of valid, final verdicts; they manifestly "have never been accorded respect as a matter of law or history." *Id.* For centuries, the law has recognized that when a criminal judgment "is reversed for error, ... then it is the same as if it had never been." 4 W. Blackstone,

Commentaries on the Laws of England 336-37 (1769). "The errors in the trial impeach the conviction; and [the defendant] must stand in the position of any man who has been accused of a crime but not yet shown to have committed it." *Fiswick v. United States*, 329 U.S. 211, 223 (1946). In other words, a vacated conviction has been "wholly nullified and the slate wiped clean." *N. Carolina v. Pearce*, 395 U.S. 711, 721 (1969); *accord Poland v. Arizona*, 476 U.S. 147, 152 (1986); *Bullington v. Missouri*, 451 U.S. 430, 442 (1981).

The decision below stands these venerable principles on their head. The court resurrected vacated convictions and perniciously elevated them to events of great constitutional significance working against the defendant. It would be astonishing for this Court to hold that the convictions here, which are invalid under the Fifth Amendment's Due Process Clause, are nonetheless valid for purposes of construing the Double Jeopardy Clause of the same Amendment.

When *Yeager* contrasted a hung count with a verdict through which the jury "speaks," the Court could not have been referring to a jury's judgment as reflected in a vacated conviction, much less an unconstitutional one. Invalid verdicts simply do not represent the voice of the community "in any relevant sense." *Yeager*, 557 U.S. at 124. Or put differently, the jury has not spoken in a way the law recognizes as legitimate and worthy of public respect. *Id.* Society has no respect for a jury's judgment that has been vacated, including, for instance, when a defendant engaged in conduct that the law does not make criminal.

Convictions are vacated only for structural error or prejudicial error, either one of which renders the jury's decision fundamentally invalid and meaningless.

With structural errors, the trial "*necessarily*" was "an unreliable vehicle for determining guilt or innocence." *Neder v. United States*, 527 U.S. 1, 9 (1999). With prejudicial errors, a court has concluded that the error "undermine[d] confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). And with forfeited errors requiring reversal, the error was both prejudicial and "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 736 (1993) (internal quotation marks omitted).

Surely *Yeager* did not contemplate that a jury "speaks" through a verdict rendered by five jurors or a panel of minors. Nor does a jury "speak" when it convicts after being ordered to return a guilty verdict, *cf. Rose v. Clark*, 478 U.S. 570, 578 (1986), or after being told by the judge that the defendant's "every single word ... was a lie," *Quercia v. United States*, 289 U.S. 466, 468 (1933). A jury certainly does not "speak" when it convicts based on a mere preponderance of the evidence—an error this Court already has held "vitiates *all* the jury's findings." *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). And the same is true when intentional racial discrimination infects jury selection, *Foster v. Chatman*, — S. Ct. — (2016), or the defendant is denied counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963)—or when failure to disclose exculpatory evidence, *Brady v. Maryland*, 373 U.S. 83 (1963), ineffective assistance of counsel, *Strickland*, 466 U.S. 668, or coerced confessions, *Arizona v. Fulminante*, 499 U.S. 279 (1991), undermine the reliability of the outcome. But the necessary implication of the government's position is that convictions vacated for any or all of these reasons are jury "decisions" that "speak" just the same as valid convictions.

None of these vacated convictions speak in any way that counts under our legal system, and neither do the ones here. The First Circuit vacated petitioners' § 666 convictions as unconstitutional precisely because they do not reflect the jury's agreement with respect to any relevant question. The district court asked the jury to convict if it found that petitioners engaged in *either* conduct that was lawful (a gratuity) *or* conduct that was unlawful (a bribe), and the jury convicted. That decision is meaningless. It makes no difference that jurors filled out a "verdict" form or that words came out of the foreperson's mouth at the end of the trial. Convictions that are vacated because the government cheated are no more "jury decisions" than Lance Armstrong is a "winner" of the Tour De France or the Eighteenth Amendment "prohibit[s]" the sale of "intoxicating liquors."

b. *Yeager* also held that a hung count is irrelevant in the *Ashe* analysis because a hung count is "a nonevent" for other double jeopardy purposes. 557 U.S. at 120. A vacated conviction is equally a nonevent for those other double jeopardy purposes and therefore equally irrelevant to the *Ashe* analysis.

A hung count is not an event that "terminates the original jeopardy," *Richardson v. United States*, 468 U.S. 317, 326 (1984), and thus a retrial is ordinarily a permissible "continuation of the initial jeopardy," *Yeager*, 557 U.S. at 118. As *Yeager* explained, "[t]he 'interest in giving the prosecution one complete opportunity to convict those who have violated its laws' justifies treating the jury's inability to reach a verdict as a *nonevent* that does not bar retrial." *Id.* (quoting *Arizona v. Washington*, 434 U.S. 497, 509 (1978)) (emphasis added).

The rule that a hung count is a "nonevent" for purposes of continuing jeopardy compelled *Yeager*'s conclusion that a hung count is equally irrelevant for purposes of the double jeopardy collateral estoppel prong. "[F]or double jeopardy purposes, the jury's inability to reach a verdict on the insider trading counts was a *nonevent* and the acquittals on the fraud counts are entitled to" preclusive effect just as if those acquittals had stood alone at "a trial for a single offense." *Yeager*, 557 U.S. at 120 (emphasis added). In other words, Yeager's acquittals terminated jeopardy and were entitled to preclusive effect under *Ashe*, without consideration of nonevent hung counts that did not terminate jeopardy.

Yeager accordingly rejected the government's reliance on *Richardson*, 468 U.S. 317. Based on *Richardson*'s holding that a hung count *ordinarily* permits retrial, *id.* at 324-25, "the government extrapolate[d] the altogether different principle that retrial is *always* permitted whenever a jury convicts on some counts and hangs on others," *Yeager*, 557 U.S. at 123. But *Richardson* "did not open the door to using a mistried count to ignore the preclusive effect of a jury's acquittal." *Id.* at 124. It closed that door. *Richardson*'s "conclusion was a *rejection* of the argument—similar to the one the Government urges today—that a mistrial is an event of significance." *Yeager*, 557 U.S. at 123-24 (emphasis added). The principle that hung counts are insignificant nonevents for purposes of continuing jeopardy necessarily means that hung counts are nonevents for purpose of double jeopardy collateral estoppel analysis. *Id.* Indeed, it would be incoherent to hold that an event is insignificant for purposes of one aspect of the Double Jeopardy Clause but of controlling significance for another aspect.

Once again, *Yeager* is dispositive here. Just like a hung count, a vacated conviction neither terminates jeopardy nor prohibits retrial. "The general rule is that the [Double Jeopardy Clause] does not bar re-prosecution of a defendant whose conviction is overturned on appeal." *Boston Mun. Court v. Lydon*, 466 U.S. 294, 308 (1984) (citing *United States v. Ball*, 163 U.S. 662 (1896)). "[I]mplicit in the *Ball* rule permitting retrial after reversal of a conviction is the concept of 'continuing jeopardy.'" *Id.* (citation omitted). If the *Richardson* rule ordinarily permitting retrial of hung counts is "a rejection of the argument" that hung counts are relevant under *Ashe*, *see Yeager*, 557 U.S. at 123, the *Ball* rule ordinarily permitting retrial of vacated convictions is equally a rejection of the argument that vacated convictions are relevant under *Ashe*.

To hold otherwise would tear away at the foundation of the *Ball* rule. The "rule that there is no double jeopardy bar to retrying a defendant who has succeeded in overturning his conviction ... rests on the premise that the original conviction has been nullified." *Bullington*, 451 U.S. at 442. In other words, the *Ball* rule "rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." *Pearce*, 395 U.S. at 720-21.

That premise cannot coexist with the holding below that a vacated conviction retains significance for double jeopardy collateral estoppel purposes. *Pearce* confirms the point. There, the Court held that, if a jury convicts on retrial after a vacated conviction, the Double Jeopardy Clause does not "preclude[]" a "more severe sentence" than the one the trial court originally imposed in connection with the vacated conviction.

Pearce, 395 U.S. at 723. To give preclusive effect to the original sentence "would be to cast doubt upon the whole validity of the basic principle" of *Ball* that the vacated conviction has been "wholly nullified and the slate wiped clean." *Pearce*, 395 U.S. at 721. Using a vacated conviction to cancel out the preclusive effect of an acquittal likewise would cast doubt on *Ball*'s premise. And if a *defendant* cannot gain any advantage from his "wholly nullified" conviction under *Pearce*, fundamental fairness bars the *government* from using such a conviction to its own advantage.[2]

The First Circuit accordingly had it backwards in stressing that the "convictions here were vacated only for trial error." Pet. App. 17a. In contrast to a reversal for insufficiency of the evidence, the court stated, "a 'reversal for trial error ... does not constitute a decision to the effect that the government has failed to prove its case,'" and ordinarily permits the government to retry. *Id.* at 17a (quoting *Burks v. United States*, 437 U.S. 1, 15 (1978)). But as just explained, the insignificance of a vacated conviction for purposes of continuing jeopardy means that a vacated conviction is equally insignificant for purposes of collateral estoppel. Here, the jury issued a "decision to the effect that the government failed to prove its case" by *acquitting* petitioners of conspiring and traveling to violate § 666. Just as in *Yeager*, those acquittals are

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[2] After rejecting the notion that a prior sentence had preclusive effect for double jeopardy purposes, *Pearce* held that the Due Process Clause creates a rebuttable presumption barring additional punishment following retrial, to ensure that such punishment was not imposed as a penalty on the exercise of the defendant's appeal right. 395 U.S. at 723-24. That due process aspect of *Pearce* has been partially overruled by *Alabama v. Smith*, 490 U.S. 794 (1989).

the only decisions that have any significance under the Double Jeopardy Clause.

c. *Yeager* additionally refused to consider hung counts in the *Ashe* analysis because "there is no way to decipher what a hung count represents." 557 U.S. at 121. A vacated conviction produces the same uncertainty, especially in cases of instructional error.

The government in *Yeager* argued that the hung insider trading counts necessarily showed that some number of jurors thought the defendant guilty of insider trading. Brief for United States at 30-34, *Yeager v. United States*, 557 U.S. 110 (2009) (No. 08-67) (hereinafter, "U.S. *Yeager* Brief"). This Court disagreed, explaining that hung counts need not reflect any substantive determination. To the contrary, "[a] host of reasons—sharp disagreement, confusion about the issues, exhaustion after a long trial, to name but a few—could work alone or in tandem to cause a jury to hang." *Yeager*, 557 U.S. at 121. No one can "identify which factor was at play in the jury room," and the Court declined to invite improper "speculation into what transpired." *Id.* at 121-22. "Such conjecture about possible reasons for a jury's failure to reach a decision should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return." *Id.* at 122.

If anything, a vacated conviction is even *less* meaningful than a hung count. In *Yeager*, the defendant unquestionably received a fair trial, and at least some jurors presumably concluded that the government had proven the defendant guilty under the relevant law. In other words, at least some jurors concluded that the defendant had committed an actual crime. When a conviction is vacated, by contrast, the whole point is that we do not know what the jury

would have concluded in the absence of the error. Here, petitioners received an unfair trial tainted by faulty instructions, and one cannot say that *any* juror thought the government had proven *any* relevant fact. For all we know, the jurors found only that petitioners engaged in a gratuity, *i.e.*, conduct that all agree is not a crime. With proper instructions, the jury at a minimum might have hung on the § 666 counts, in which case *Yeager* would bar a retrial. It would be highly anomalous for this Court to hold that defendants are *worse* off when illegal instructions advocated by the government eliminate the possibility of a hung jury.

But at the very least, just as in *Yeager*, it is impossible to decipher what the vacated convictions at the 2011 trial represented. The jury might have convicted petitioners of the standalone § 666 counts for a "host of reasons." *Yeager*, 557 U.S. at 121. For example, all 12 jurors might have agreed that petitioners were not guilty of an "exchange," but one juror might have thought petitioners guilty of a "gratuity." Absent the improper gratuity theory, the jury might have acquitted on the standalone § 666 counts as well as the conspiracy and travel counts. But the instructions allowing conviction on an improper gratuity theory might have led the jury, as a consequence of "sharp disagreement" or "exhaustion," *id.* at 121, to settle on acquitting petitioners of the conspiracy and travel counts but convicting on the standalone § 666 charges. *See infra* at 46. That is no different than the possibility in *Yeager* that the jury, as a consequence of "sharp disagreement" or "exhaustion," settled by acquitting on the fraud counts but hanging on insider trading.

Alternatively, all 12 jurors might have thought petitioners guilty of a gratuity, while none thought them guilty of an exchange. But as a result of "confusion about the issues," *id.*, the jury might have chosen to convict petitioners on the § 666 charges while acquitting on the conspiracy and travel charges. That is no different than the possibility in *Yeager* that "confusion about the issues" could have caused the apparent inconsistency between the acquittals and hung counts.

This Court has recognized the risk that impermissibly broad charges will have precisely such mischievous influences. In *Price v. Georgia*, 398 U.S. 323 (1970), the defendant faced an improper murder charge and a proper manslaughter charge, and the jury convicted him of manslaughter. The inclusion of the improper murder charge was not harmless error despite the jury's acquittal on that charge, the Court held, because the presence of an impermissibly broad charge may have "induced the jury to find [the defendant] guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence." *Id.* at 331. Similarly here, the faulty instructions may have induced the jury to convict where it otherwise would not have.

C. *Powell* Confirms That a Vacated Conviction Cannot Strip an Acquittal of Preclusive Effect

The First Circuit held that *United States v. Powell*, 469 U.S. 57 (1984), imposes an "important limitation" on *Ashe*'s collateral estoppel rule. Pet. App. 10a. *Powell* held that, in a single trial, a defendant may not overturn a jury's valid conviction on one count as inconsistent with the same jury's acquittal on another count. 469 U.S. at 69. The court below extended

Powell to hold that, because the jury acted inconsistently in acquitting on some counts and failing to acquit on others, collateral estoppel does not bar retrial. Pet. App. 11a.

This too should sound familiar. The First Circuit embraced the very argument this Court rejected in *Yeager*—namely, that *Powell* extends to the context of a re-prosecution and forecloses collateral estoppel when the first jury inconsistently acquitted on one count but not another. U.S. *Yeager* Brief 30-31. In rejecting that argument, *Yeager* held that *Powell* undermined—not advanced—the government's position. *Powell* in fact compelled the conclusion that Yeager's acquittals *retained* preclusive effect despite the apparent inconsistency with the hung counts. *Yeager*, 557 U.S. at 124-25. Again, the arguments for ignoring vacated convictions are even stronger.

1. *Powell* Holds That One Valid Verdict Cannot Impugn Another Valid Verdict

In *Powell*, the jury convicted the defendant of using a telephone to facilitate certain drug offenses, but acquitted her of the predicate drug offenses. *Id.* at 59-60. On appeal, the defendant challenged the conviction on the ground that it was inconsistent with the jury's simultaneously rendered acquittals. The defendant argued that "collateral estoppel should apply to verdicts rendered by a single jury, to preclude acceptance of a guilty verdict on a telephone facilitation count where the jury acquits the defendant of the predicate felony." *Id.* at 64.

This Court rejected the notion that double jeopardy applies to inconsistent verdicts in a single trial and accordingly addressed the question whether the inconsistency mattered "only under [its] supervisory

powers over the federal criminal process." *Id.* at 65. And in holding that the valid conviction must stand, the Court reasoned that "the same jury reached inconsistent results; once that is established principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful." *Id.* at 68.

Relying on its decision to the same effect in *Dunn v. United States*, 284 U.S. 390 (1932), the Court reaffirmed that "a criminal defendant convicted by a jury on one count [may] not attack that conviction because it was inconsistent with the jury's verdict of acquittal on another count." *Powell*, 469 U.S. at 58. Litigants may not object to a valid, final verdict on the ground that, based on an another, inconsistent valid verdict, the jurors "did not speak their real conclusions." *Id.* at 64-65 (quoting *Dunn*, 284 U.S. at 393). As a matter of policy, *Powell* explained, "[c]ourts have always resisted inquiring into a jury's thought processes; through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality." *Id.* at 67 (citations omitted).

2. *A Fortiori*, an Invalid Conviction Cannot Impugn a Valid Acquittal

Powell commands the conclusion that an invalid conviction does not eliminate the preclusive effect of an acquittal, regardless of an apparent inconsistency.

Yeager explained: "In *Powell* and, before that, in *Dunn*, [the Court] w[as] faced with jury verdicts that, on their face, were logically inconsistent and yet [the Court] refused to impugn the legitimacy of either verdict." 557 U.S. at 125. *Powell* and *Dunn* hold that

"a logical inconsistency between a guilty verdict and a verdict of acquittal does not impugn the validity of either verdict." *Yeager*, 557 U.S. at 112. "[R]espect for the jury's verdicts counseled giving each verdict full effect, however inconsistent." *Id.* at 124.

Yeager thus explained that, under *Powell*, acquittals retain their preclusive effect despite the jury's apparent inconsistency in hanging on other counts. Citing *Powell* and *Dunn*, the government had argued that the acquittals lacked preclusive effect because "a jury that acquits on some counts while inexplicably hanging on others is not rational." 557 U.S. at 124. This argument, *Yeager* held, "misreads" *Powell* and *Dunn*. *Id.* at 125. Those decisions "declined to use a clearly inconsistent verdict [the acquittal] to second-guess the soundness of another verdict [the conviction]." *Id.* If a final, valid verdict cannot impugn another valid verdict, *Yeager* explained, "then, *a fortiori*, a potentially inconsistent hung count could not command a different result"—*i.e.*, a hung count could not eliminate the double jeopardy preclusive effect of an acquittal. *Id.*

Yet again, that analysis applies with even greater, and at least equal, force here. If an inconsistent *valid* verdict cannot impugn another verdict under *Powell*, then, "*a fortiori*," an inconsistent *vacated* conviction cannot "command a different result"—*i.e.*, a vacated conviction cannot eliminate the preclusive effect of an acquittal. *Id.*

The government's reliance on *Powell* here is even more "serious[ly] flaw[ed]" than it was in *Yeager*. 557 U.S. at 124. First, if it is improper to "equat[e]" hung counts and valid verdicts, *id.*, it is even more improper to equate vacated convictions and valid verdicts. *Yeager* described hung counts as the "thinnest reed of

all" with which to "second-guess the soundness" of an acquittal. *Id.* at 125. Evidently the Court did not anticipate that the government would try to use vacated, unconstitutional convictions.

Second, if it is improper under *Powell* to use an inconsistent verdict to second-guess a valid verdict of *conviction*, it is all the more improper to second-guess a valid verdict of *acquittal*. An acquittal is the most sacrosanct verdict of all under the Double Jeopardy Clause. "[T]he primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment [of acquittal]." *United States v. Scott*, 437 U.S. 82, 92 (1978). Verdicts of acquittals accordingly are entitled to "special weight," *Tibbs v. Florida*, 457 U.S. 31, 41 (1982), and "particular significance," *United States* v. *DiFrancesco*, 449 U.S. 117, 129 (1980) (quoting *Scott*, 437 U.S. at 91). For centuries, the law has safeguarded acquittals against any challenge—even "flat-out acquittals in the face of guilt," *Jones v. United States*, 526 U.S. 227, 245 (1999), and acquittals "based upon an egregiously erroneous foundation," *Evans v. Michigan*, 133 S. Ct. 1069, 1074 (2013) (internal quotation marks omitted).

"Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that 'a verdict of acquittal ... could not be reviewed, on error or otherwise, without putting a defendant twice in jeopardy, and thereby violating the Constitution.'" *Martin Linen*, 430 U.S. at 572 (quoting *Ball*, 163 U.S. at 671). "To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendants so that 'even though

innocent, he may be found guilty.'" *Scott*, 437 U.S. at 91 (quoting *Green*, 355 U.S. at 188).

In short, *Powell*'s respect for the finality of valid verdicts necessarily forecloses the government from using an invalid, vacated conviction to strip a valid acquittal of its preclusive effect.

3. The Government Cannot Attribute Irrationality to Jury Acquittals

The government relies on *Powell*'s observation that, when "the same jury reached inconsistent results[,] ... principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful." 469 U.S. at 68; *see* Brief in Opposition 15 (quoting same). Or, as the First Circuit theorized, an unlawful conviction, though vacated, "may still suggest that an acquittal with which that conviction conflicts was the result of 'mistake, compromise, or lenity.'" Pet. App. 18a (quoting *Powell*, 469 U.S. at 65).

But *Yeager* rejected these exact arguments, because the *Ashe* analysis does not permit the second-guessing of acquittals. In *Yeager*, quoting the very same language from *Powell*, the government argued that the jury's "inconsistency vitiates 'the assumption that the jury acted rationally,' which is a necessary predicate for application of collateral estoppel." U.S. *Yeager* Brief 30 (quoting *Powell*, 469 U.S. at 68). The government further argued that the inconsistency shows that it was "'equally possible' the acquittal was the result of 'mistake, compromise, or lenity'"; "[a]ll a court can conclude is that the jury acted inconsistently and irrationally"; and "[a]ccordingly, the logical predicate for applying collateral estoppel is missing." U.S. *Yeager* Brief 31 (quoting *Powell*, 469 U.S. at 65).

Yeager found all this unconvincing: collateral estoppel applies despite any inconsistency between the hung counts and the acquittals. *Yeager* did so even though, where an acquittal rests on a factual finding that logically required an acquittal on a hung count, one can equally say that "the conflicting dispositions are irrational—the result of 'mistake, compromise, or lenity.'" *Yeager*, 557 U.S. at 132 (Scalia, J., dissenting) (quoting *Powell*, 469 U.S. at 65).

Powell did not involve either a vacated conviction or a subsequent prosecution, *i.e.*, the posture of this case. *Powell* instead means that collateral estoppel cannot apply in the context of inconsistent *valid* verdicts at a *single* trial, where giving collateral estoppel effect to either determination would undermine the other. But petitioners did not seek to use the inconsistent verdicts as a basis for vacating the convictions. Rather, the convictions were invalid not because of any inconsistency, but because the government charged petitioners with conduct that did not constitute a crime.

Where the only valid verdict in the first trial is an acquittal, *Yeager* holds that the assumption of rationality fully applies to that acquittal and that the acquittal must be viewed in isolation. The government cannot *undermine* that assumption by using a hung count, which is not itself a valid verdict, to attack as irrational the only valid verdict, namely the acquittal. "By relying on hung counts to question the basis of the jury's verdicts, the Government violates the very assumption of rationality it invokes for support." *Yeager*, 557 U.S. at 125.

The government's argument in this case would violate the assumption of rationality in the same way. Today, the valid verdicts from the 2011 trial—the

verdicts of acquittal for conspiring and travelling to violate § 666—are entirely consistent with each other. They reflect no irrationality. As in *Yeager*, the government seeks to question the rationality of those acquittals—this time, by relying on the vacated convictions. And by pursuing a retrial, the government seeks to *create* irrationality—to convince a second jury to reach final, valid verdicts of conviction that the government concedes would be at odds with the first jury's acquittals. *Powell*'s refusal to disturb existing inconsistent final verdicts hardly suggests that this Court should adopt a rule encouraging their creation.

The government's position not only runs headlong into *Powell* and *Yeager*, but also into *Ashe* itself. *Ashe* mandates examining the acquittal and determining what "a *rational* jury could have grounded its verdict upon," regardless of whether the jury in fact may have acted irrationally. 397 U.S. at 444 (emphasis added). Collateral estoppel thus barred the subsequent prosecution in *Ashe* because "[t]he single *rationally* conceivable issue in dispute" was the identity of the robber. *Id.* at 445 (emphasis added). *Ashe* commands that acquittals be taken at face value, and bars any further inquiry into whether the jury may have acted irrationally, for instance, by "disbeliev[ing] substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest." *Id.* at 444 n.9 (internal quotation marks omitted).

All this forecloses any notion that valid, final acquittals lack preclusive effect because the jury may have acted irrationally in failing to acquit on other counts. With any other rule, the "possible multiplicity of prosecutions [would be] staggering." *Id.* (internal quotation marks omitted). In any number of

situations, the government may think it can prove—based on "the record of [the] prior proceeding ... with an eye to all the circumstances," *id.* at 444—that an acquittal was irrational or otherwise did not reflect the jury's real conclusion. Suppose that in a trial on a single-count indictment with only one disputed fact, the jury acquits but writes on the verdict form: "We unanimously believed that the defendant was guilty, but we acquitted based on lenity"—or "exhaustion" or "mistake" or "we hated the prosecutor" or "we distrust the government" or "we flipped a coin." Or suppose prosecutors put on irrefutable DNA evidence of guilt; defense counsel puts on no case, admits guilt in closing argument, and pleads only for lenity; and the jury then acquits.

If the government can use a vacated, unconstitutional conviction to establish the irrationality of an acquittal and deprive it of preclusive effect, no logical distinction would bar the government from similarly proving irrationality in any of these situations. In each, the government could effectively rebut the assumption of rationality assigned to acquittals. But going down this road would risk eviscerating the collateral estoppel rule, and with it an essential double jeopardy protection founded on our unwavering reverence for acquittals.

II. A Vacated, Unconstitutional Conviction Cannot Deprive a Defendant of an Otherwise Applicable Constitutional Right

A rule giving effect to a vacated conviction is contrary to a host of this Court's precedents and would have broad and troubling implications for our criminal justice system. The First Circuit invoked a conviction that violated the Due Process Clause to deprive petitioners of the protections of the Double Jeopardy

Clause. To our knowledge, this Court has never held that a vacated conviction can be used against a defendant for any purpose. To the contrary, this Court has expressly held that a defendant whose conviction was invalid "must stand in the position of any man who has been accused of a crime but not yet shown to have committed it." *Fiswick*, 329 U.S. at 223. It is accordingly hornbook law across a wide variety of contexts that a vacated conviction is a legal nullity that stands for nothing. *Pearce*, 395 U.S. at 721; *Poland*, 476 U.S. at 152; *Bullington*, 451 U.S. at 442. The government should never benefit from an unconstitutional conviction that prosecutors secured by advancing an overreaching interpretation of a criminal statute. This Court certainly should not depart from its precedent and make an exception to deprive a defendant of *another* constitutional right.

Most notably, vacated convictions are irrelevant for purposes of civil collateral estoppel. Collateral estoppel "means simply that, when an issue of ultimate fact has once been determined by a *valid and final* judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 439 (emphasis added); *see* Restatement (Second) of Judgments § 27 (collateral estoppel requires a "valid and final judgment"). Thus, a vacated judgment has been "subverted and rendered null and void for the purpose of [collateral estoppel]." *Butler v. Eaton*, 141 U.S. 240, 242-43 (1891). Vacating one judgment requires vacating the judgment that depended on it, because the original judgment "is, to our judicial knowledge, without any validity, force or effect, and ought never to have existed." *Id.* at 244.

This rule necessarily bars civil collateral estoppel based on a vacated criminal judgment, even where the

conviction was vacated on "grounds having no bearing on the validity of the fact-findings." *Dodrill v. Ludt*, 764 F.2d 442, 444 (6th Cir. 1985). And not only are vacated judgments disentitled to direct collateral estoppel effect, the fact of the decision is inadmissible even as evidence supporting the formerly victorious party. *Simpson v. Motorists Mut. Ins. Co.*, 494 F.2d 850, 854 (7th Cir. 1974).

Because vacated convictions are irrelevant for civil collateral estoppel, they must be irrelevant for the collateral estoppel aspect of the Double Jeopardy Clause. This Court held a century ago that the rule of collateral estoppel cannot be any less protective of criminal defendants than it is of civil litigants. "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916) (Holmes, J.); *see also Yeager*, 557 U.S. at 119 n.4 (quoting same). "[T]he 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice, in order, when a man once has been acquitted on the merits, to enable the government to prosecute him a second time." *Oppenheimer*, 242 U.S. at 88.

The rule that vacated convictions have no collateral estoppel effect is merely one example of an equally well-settled, categorical rule: an invalid, "vacated conviction [may not] be used to the defendant's detriment." *People v. Wilson*, 852 N.W.2d 134, 141 n.5 (Mich. 2014). An invalid or vacated conviction may not be used to impeach a criminal defendant. *Loper v. Beto*, 405 U.S. 473, 483 (1972); *United States v. Russell*, 221 F.3d 615, 622 (4th Cir. 2000). A vacated conviction may not be used to establish an aggravating

circumstance supporting the death penalty. *Johnson v. Mississippi*, 486 U.S. 578, 585-86 (1988). A vacated conviction may not be used to enhance a sentence. *Johnson v. United States*, 544 U.S. 295, 303 (2005). And a vacated conviction means that "there is no longer a 'conviction' for immigration purposes." *Garces v. U.S. Att'y Gen.*, 611 F.3d 1337, 1344 (11th Cir. 2010).

In turn, when a conviction is vacated, all the collateral consequences that attach to a valid conviction disappear. One reason that the completion of a criminal sentence does not moot a criminal appeal is that vacating the conviction would eliminate any collateral consequences, such as the loss of voting or other civil rights. *Sibron v. New York*, 392 U.S. 40, 50-58 (1968); *Pollard v. United States*, 352 U.S. 354, 358 (1957); *United States v. Morgan*, 346 U.S. 502, 512-13 (1954); *Fiswick*, 329 U.S. at 223. Vacating a conviction affords the defendant "relief not only from the conviction's *direct* consequences (*e.g.* incarceration), but also from its *collateral* consequences." *Gentry v. Deuth*, 456 F.3d 687, 693 (6th Cir. 2006).

The First Circuit did not question that a "vacated conviction has been 'nullified.'" Pet. App. 16a (quoting *Bullington*, 451 U.S. at 442). Nevertheless, quoting *United States v. Crowell*, 374 F.3d 790, 792 (9th Cir. 2004), the court stated that "the 'fact of the conviction'" remains even after the vacatur, and that "it is the 'fact of the conviction,' and not its 'attendant legal disabilities,' that is relevant to the *Ashe* analysis." Pet. App. 16a. But *Crowell* held only that a defendant cannot bring a motion for expungement to collaterally attack a conviction. *Crowell* is entirely inapposite and does not stand for the proposition that a vacated

conviction can have legal significance in the government's favor. Drawing a basic distinction between vacating a conviction and expunging it, the court held that even after a conviction is vacated, the "fact of the conviction" remains in the sense that the court does not "destroy or seal the records of the fact of the defendant's conviction." 374 F.3d at 792. The fact that no one has shredded the paperwork recording the vacated convictions here is no license for the government to use them against petitioners.

In any event, it is decidedly not the "fact of the conviction" that the First Circuit took into account in depriving petitioners of the protections of the Double Jeopardy Clause. Rather, the court examined in depth the purported underlying factual determinations by the jury that the court found were reflected in the vacated convictions. That is why the court devoted 20 pages of its slip opinion to exploring what the jury "necessarily decided" when it convicted the petitioners on the basis of unlawful instructions. Pet. App. 20a-33a. Reciting the historical "fact of the conviction" would have taken one sentence. And it is Kafkaesque to tell a defendant that his vacated conviction is not being used to impose any "attendant legal disabilit[y]," *id.* at 16a, when the vacated conviction is the sole reason that he remains exposed to a criminal charge carrying a potential 10-year sentence. Under the First Circuit's rule, the government may retry petitioners *only* because the government previously obtained illegal convictions based on illegal jury instructions. But this Court held long ago that attaching collateral consequences to a vacated conviction impermissibly "would permit the government to compound its error at [the defendant's] expense." *Fiswick*, 329 U.S. at 223.

This Court should not depart from the foundational rule that the government cannot use a vacated conviction against a defendant. And the Court should be especially reluctant to do so where the government's fundamental goal in using the vacated conviction is to question the defendant's innocence on the same charge. When a conviction is vacated, the presumption of innocence is restored—"unless and until petitioner should be retried, he must be presumed innocent." *Johnson*, 486 U.S. at 585. But the government's theory is that the vacated convictions embody a factual finding of guilt, and worse yet, one that impugns the jury's *valid* finding of innocence on overlapping charges.

The double jeopardy protection is "a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued." *Green*, 355 U.S. at 198. "If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance." *Id.* It would be a narrow and grudging application indeed to hold that vacated convictions are null for all purposes but this one, and that the protections of double jeopardy are defeated by a judgment the product of a "judicial process which is defective in some fundamental respect." *Burks*, 437 U.S. at 15.

III. The Decision Below Invites Prosecutorial Abuse

Ashe's collateral estoppel rule is designed to mitigate the abuses made possible by the breathtaking array of overlapping criminal offenses set out in the modern criminal code. The decision below turns that design on its head. Overcharging a case often produces split jury verdicts, and the government's position would permit prosecutors to avoid collateral

estoppel by engaging in precisely the abuses the rule is designed to stifle. The decision below in fact encourages prosecutors to bring multiple, overlapping charges, and to advocate overbroad interpretations of criminal statutes. This Court should not sanction such perverse incentives for the government.

A. Overcharging and Overbroad Interpretations of Criminal Statutes Are Rampant

1. In the early years following the enactment of the Double Jeopardy Clause, few situations arose calling for application of collateral estoppel because criminal offenses "were relatively few and distinct," meaning "[a] single course of criminal conduct was likely to yield but a single offense." *Ashe*, 397 U.S. at 445 n.10. But with the "extraordinary proliferation of overlapping and related statutory offenses," prosecutors gained the ability to "spin out a startlingly numerous serious of offenses from a single alleged criminal transaction." *Id.* "As the number of statutory offenses multiplied, the potential for unfair and abusive prosecutions became far more pronounced." *Id.* Collateral estoppel operates as a "safeguard" to "prevent against such abuses." *Id.*

The problem has only grown worse since *Ashe*. Three of every five federal crimes "enacted since the Civil War have been enacted since 1970," when the Court decided *Ashe*. Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. Crim. L. & Criminology 643, 653 (2006). In 2008, the United States Code contained at least 4,450 federal crimes, with Congress creating 500 new crimes per decade. John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Legal Memorandum (Heritage Foundation), June 16, 2008, at 1. In this respect, criminal law presents "a singular

case in the legislative process: criminal law expands unusually easily, and its contraction is unusually difficult." Darryl K. Brown, *Democracy and Decriminalization*, 86 Tex. L. Rev. 223, 233 (2007).

The consequence is a cornucopia of criminal statutes that cover similar, if not identical, conduct. To name a few examples, the federal criminal code in 1998 contained "232 statutes pertaining to theft and fraud, 99 pertaining to forgery and counterfeiting, 215 pertaining to false statements, and 96 pertaining to property destruction." O'Sullivan, *supra*, at 654.

The depth and breadth of the criminal code gives prosecutors extraordinary power to bring overlapping, duplicative charges. Prosecutors "retain 'broad discretion' to enforce the Nation's criminal laws," *United States v. Armstrong*, 517 U.S. 456, 464 (1996), including the discretion to decide whom to charge, what charges to bring, and how many. Prosecutors "have the ability to pick and choose among a smorgasbord of statutes that might apply to given criminal conduct." O'Sullivan, *supra*, at 654. As long as each count represents a "distinct offense," *Blockburger v. United States*, 284 U.S. 299, 304 (1932), and is supported by probable cause to indict, prosecutors can charge as many offenses as they want. And coming up with multiple charges for a single, allegedly unlawful act is not difficult. In one U.S. Attorney's Office, it was sport. Prosecutors reportedly made a game of dreaming up criminal charges they could bring against random celebrities using "broad yet obscure crimes that populate the U.S. Code." Tim Wu, *American Lawbreaking*, Slate (Oct. 14, 2007), http://goo.gl/AFsWXl.

Games aside, prosecutors in fact have strong incentives to engage in "horizontal overcharging—

multiplying unreasonably the number of accusations against a single defendant." Albert W Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 85 (1968) (internal quotation marks omitted). Plea bargaining "presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense." *Lafler v. Cooper*, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting). "Prosecutors throw everything in an indictment they can think of, down to and including spitting on the sidewalk." Alschuler, *supra*, at 86. By charging multiple offenses, "prosecutors can, even in discretionary sentencing systems, significantly raise the defendant's maximum sentence, and often raise the minimum sentence as well." William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 519-20 (2001). Additional, duplicative charges increase prosecutors' leverage, and pressure defendants to take deals. Defendants must either go to trial risking an extremely long sentence or ensure a much shorter sentence by taking a plea. "[T]hat state of affairs is not the exception, but the rule." *Id.* at 519.

If a defendant goes to trial, he faces a prosecutor armed with a multitude of charges, but needing a conviction on only one. And multitudinous charges dramatically increase the likelihood of at least one conviction. The conviction rate at trial is 68% for a single-count indictment, but jumps to 82% when prosecutors charge two counts and to 88% when they charge three. Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 Vand. L. Rev. 349, 367-68 (2006). The many charges allow jurors to "horse trade" counts if there is disagreement as to guilt, and also can lead jurors wrongly to believe that

a defendant charged with so many offenses must be guilty of something. Multi-count indictments also increase the chances that the defendant will be convicted of the most serious offense charged, or the "top count." *Id.* at 367.

These statistics have real consequences when prosecutors' job performance frequently is measured by conviction rates. At the state level, elected prosecutors often "cite conviction rates in their campaigns." Stuntz, *supra*, at 534. And the Justice Department evaluates attorneys based in part on the "percentage of cases favorably resolved,"[3] meaning a prosecutor's conviction rate. Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors' Offices*, 22 Cornell J. L. & Pub. Pol'y 53, 64 (2012).

It is not hard to find recent and extreme examples of blatant overcharging. In one case, the defendant was convicted of conspiracy to commit arson and also of "the use of fire to commit another felony" where the "predicate felony was conspiracy to commit arson"—in other words, (1) conspiracy to use fire and (2) using fire to conspire to use fire. *United States v. Anderson*, 783 F.3d 727, 737 (8th Cir. 2015). In another case, the defendant was convicted of "assault with a dangerous weapon in furtherance of a racketeering enterprise" and "use of a firearm in relation to a crime of violence" where the predicate crime of violence was the assault with a dangerous weapon. *United States v. Garcia*, 754 F.3d 460, 475 (7th Cir. 2014). And in another case, defendants were convicted of "sex trafficking by fraud"

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[3] U.S. Gov't Accountability Off., GAO-04-422, Report to Congressional Requesters, U.S. Attorneys: Performance-Based Initiatives Are Evolving 5 (2004).

and "benefitting by participating in a venture that commits sex trafficking by fraud"—even though these offenses appeared in subsections of the same statute and involved the same underlying conduct. *United States v. Flanders*, 752 F.3d 1317, 1327 (11th Cir. 2014).

2. Compounding the problem is Congress' penchant for enacting broadly worded offenses and the government's penchant for pushing interpretations even broader than Congress imagined. The government frequently wins convictions under graspingly expansive theories that are later rejected on appeal, forcing defendants to undergo the "embarrassment, expense and ordeal" of a second trial premised on a proper interpretation of the statute—the interpretation that the government should have started with. *Green*, 355 U.S. at 187-88.

In *Bond v. United States*, 134 S. Ct. 2077 (2014), this Court rejected the government's interpretation of the Chemical Weapons Convention Implementation Act that would "sweep in everything from the detergent under the kitchen sink to the stain remover in the laundry room." *Id.* at 2091. "[T]he global need to prevent chemical warfare," the Court admonished, "does not require the Federal Government to reach into the kitchen cupboard." *Id.* at 2093. Similarly in *Yates v. United States*, 135 S. Ct. 1074 (2015), the Court "reject[ed] the Government's unrestrained reading" of the Sarbanes-Oxley Act to prohibit a fisherman from throwing overboard undersized red grouper, a reading that "extends beyond the principal evil motivating [the Act's] passage." *Id.* at 1081; *see also Skilling v. United States*, 561 U.S. 358, 410-11 (2010) (rejecting the government's "amorphous" and "less constrained construction" of the honest-services

fraud statute); *Chambers v. United States*, 555 U.S. 122, 128-30 (2009) (rejecting the government's interpretation of "violent felony" as including failure to report to penal institution); *Jones v. United States*, 529 U.S. 848, 857 (2000) (rejecting the government's "expansive" interpretation of "affecting . . . commerce" in the federal arson statute); *Cleveland v. United States*, 531 U.S. 12, 24 (2000) (rejecting the government's "sweeping expansion" of federal criminal jurisdiction through a broad interpretation of "property" in the federal mail fraud statute).

Lower courts likewise have noted the "string of recent cases in which ... federal prosecutors overreached by trying to stretch criminal law beyond its proper bounds." *United States v. Goyal*, 629 F.3d 912, 922 (9th Cir. 2010) (Kozinski, C.J., concurring); *see also United States v. Newman*, 773 F.3d 438, 448 (2d Cir. 2014) (decrying the "doctrinal novelty of recent insider trading prosecutions").

This prosecution exemplifies both problems. On the basis of a single weekend trip to Las Vegas worth perhaps a few thousand dollars, the government charged petitioners with multiple, overlapping felonies: federal program bribery, traveling in interstate commerce in furtherance of federal program bribery, conspiring to commit federal program bribery, and conspiring to travel in interstate commerce in furtherance of federal program bribery—not to mention the additional counts alleging that petitioners violated *repealed* Puerto Rico bribery statutes. Simultaneously, over petitioners' vehement objections, the government sought and obtained instructions permitting the jury to convict petitioners of federal program bribery under a gratuity theory, rather than a bribery theory. The government argued

the gratuity theory to the jury in closing, and won a conviction based on that unlawful theory. Pet. App. 104a.

B. The Decision Below Exacerbates Government Overreaching

While *Ashe*'s collateral estoppel rule was designed to prevent these prosecutorial abuses, the decision below would have the opposite effect—it would encourage prosecutors to overcharge cases and to push far-reaching interpretations of criminal statutes. Prosecutors can overcharge as a form of insurance against the possibility of an acquittal on any particular count. They know that if they do, the odds are in their favor. Excluding defendants whose charges are dismissed pre-trial, 99.6% of federal criminal defendants in this country are convicted.[4] And prosecutors will push for broad interpretations of criminal statutes, knowing that if their interpretation is rejected on appeal, they can simply retry the case—making the first trial "no more than a dry run for [a] second prosecution." *Ashe*, 397 U.S. at 447. The risk of this outcome, in turn, will further motivate defendants to accept a plea, even if they are innocent and have a strong defense, because it is difficult to secure acquittals from two juries at successive trials on every count in a duplicative multi-count indictment. And in the event of any inconsistency in the jury's verdicts, the defendant must stand trial again. From the government's perspective, trial becomes a coin toss where it is heads I win, tails I get a do-over.

The interplay between *Yeager* and the decision below would exacerbate the risk of abuse. In a case

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[4] *See* Federal Judicial Caseload Statistics (Mar. 31, 2014), Table D-4, http://www.uscourts.gov/file/10657/download.

with a multi-count indictment where a split decision is likely, prosecutors would prefer an invalid conviction over a hung count. If an acquittal is inconsistent with an invalid conviction, the decision below would let the government take a second bite at the apple. But if the acquittal is inconsistent with a hung count, collateral estoppel bars retrial under *Ashe* and *Yeager*. This dichotomy would create perverse incentives for prosecutors to advocate overreaching interpretations and engage in other unfair tactics that increase the chances of a conviction relative to a hung count, secure in the knowledge that they get to retry if the conviction is invalidated on appeal.

Permitting the government to take multiple bites at the apple increases the likelihood of wrongful convictions of the innocent. *Green*, 355 U.S. at 187-88. In this case, a rational jury could not have acquitted petitioners of the conspiracy and travel charges without finding that they did not commit federal program bribery—the exact offense the government now wants to retry. Pet. App. 12a-15a n.5. Yet the First Circuit gave the government another chance because the government brought duplicative charges and won an invalid conviction under an incorrect theory that unlawfully reduced the government's burden. Letting the decision below stand sanctions and rewards the government's abuses.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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JUAN BRAVO-FERNANDEZ AND HECTOR MARTINEZ-MALDONADO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, under the collateral estoppel component of the Double Jeopardy Clause, the jury's acquittal of petitioners on some counts bars the government from retrying petitioners on another count on which the same jury convicted petitioners, when that conviction was subsequently vacated for legal error and the jury's verdict in the first trial was inconsistent.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Constitutional provision involved 2
Statement 2
Summary of argument 13
Argument:
Collateral estoppel does not apply because the inconsistent verdicts prevent petitioners from satisfying their burden of showing that the jury necessarily decided that they were not guilty of violating Section 666 17
A. The inconsistent verdicts in petitioners' first trial prevent them from showing that the jury necessarily decided that they did not commit bribery 18
B. Courts need not disregard convictions that have been vacated in determining what the jury that returned those convictions necessarily decided 25
1. Petitioners' reliance on *Yeager* is misplaced 25
2. Principles of finality and respect for the jury's verdict do not require courts to disregard a jury's inconsistency when applying collateral estoppel 35
3. Vacated convictions are a relevant part of the trial record when determining what a jury necessarily decided 41
C. Petitioners' policy arguments do not justify ignoring the inconsistency in a jury's verdicts when conducting a collateral estoppel inquiry 49
Conclusion 53

TABLE OF AUTHORITIES

Cases: Page

Arizona v. *Washington*, 434 U.S. 497 (1978) 53
Ashe v. *Swenson*, 397 U.S. 436 (1970) ..... *passim*
Blueford v. *Arkansas*, 132 S. Ct. 2044 (2012) 29
Brennan v. *United States*, 867 F.2d 111 (2d Cir.), cert. denied, 490 U.S. 1022 (1989) 43
Burks v. *United States*, 437 U.S. 1 (1978) 32, 52, 53
Crescent City Live Stock Co. v. *Butchers' Union Slaughter-House Co.*, 120 U.S. 141 (1887) 44
Dowling v. *United States*, 493 U.S. 342 (1990) 18
Dunn v. *United States*, 284 U.S. 390 (1932) 21, 35, 37
Engle v. *Isaac*, 456 U.S. 107 (1982) 49
Evans v. *Michigan*, 133 S. Ct. 1069 (2013) 13, 39
Flittie v. *Solem*, 775 F.2d 933 (8th Cir. 1985), cert. denied, 475 U.S. 1025 (1986) 19
Harris v. *Bornhorst*, 513 F.3d 503 (6th Cir.), cert. denied, 554 U.S. 903 (2008) 45
Harris v. *Rivera*, 454 U.S. 339 (1981) 35
Lockhart v. *Nelson*, 488 U.S. 33 (1988) 32
Morris v. *Mathews*, 475 U.S. 237 (1986) 16, 41, 42
Mosley v. *Wilson*, 102 F.3d 85 (3d Cir. 1996) 45
Newport News Shipbuilding & Dry Dock Co. v. *NLRB*, 738 F.2d 1404 (4th Cir. 1984) 46
North Carolina v. *Pearce*, 395 U.S. 711 (1969) 34
Russell v. *Lynaugh*, 892 F.2d 1205 (5th Cir. 1989), cert. denied, 501 U.S. 1259 (1991) 46
Schiro v. *Farley*, 510 U.S. 222 (1994) 18, 19, 33
Sealfon v. *United States*, 332 U.S. 575 (1948) 19
Standefer v. *United States*, 447 U.S. 10 (1980) ..... *passim*

Cases—Continued: Page

United States v. *Anderson*, 783 F.3d 727 (8th Cir.), cert. denied, 136 S. Ct. 199, 136 S. Ct. 200, and 136 S. Ct. 347 (2015) 50
United States v. *Ball*, 163 U.S. 662 (1896) 32
United States v. *Blanton*, 793 F.2d 1553 (11th Cir.), cert. denied, 479 U.S. 1021 (1986) 46
United States v. *Christensen*, No. 08-50531, 2015 WL 11120665 (9th Cir. July 8, 2016) 43
United States v. *Dotterweich*, 320 U.S. 277 (1943) 35
United States v. *Flanders*, 752 F.3d 1317 (11th Cir. 2014), cert. denied, 135 S. Ct. 1188 (2015) 50
United States v. *Garcia*, 754 F.3d 460 (7th Cir.), cert. denied, 135 S. Ct. 395 and 135 S. Ct. 467 (2014), 135 S. Ct. 988 and 135 S. Ct. 991 (2015) 50
United States v. *Loud Hawk*, 474 U.S. 302 (1986) 49
United States v. *Maybury*, 274 F.2d 899 (2d Cir. 1960) 21
United States v. *Neal*, 822 F.2d 1502 (10th Cir. 1987) 20
United States v. *Powell*:
708 F.2d 455 (9th Cir. 1983), rev'd, 469 U.S. 57 (1984) 39
469 U.S. 57 (1984) ..... *passim*
United States v. *Sneezer*, 983 F.2d 920 (9th Cir. 1992), cert. denied, 510 U.S. 836 (1993) 45
United States v. *Tateo*, 377 U.S. 463 (1964) 52
United States v. *Velasquez*, 885 F.2d 1076 (3d Cir. 1989), cert. denied, 494 U.S. 1017 (1990) 43, 44
United States v. *Wagner*, 989 F.2d 69 (2d Cir. 1993) 46
Yeager v. *United States*, 557 U.S. 110 (2009) ..... *passim*

Constitution, statutes and rules. Page

U.S. Const. Amend. V (Double Jeopardy Clause) .... *passim*
Computer Fraud and Abuse Act of 1986, 18 U.S.C. 1030 43
Hobbs Act, 18 U.S.C. 1951 46
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.* 43
Travel Act, 18 U.S.C. 1952(a)(3)(A) 5
18 U.S.C. 371 5
18 U.S.C. 666 ..... *passim*
18 U.S.C. 924(c) 50
18 U.S.C. 1512 (2000 & Supp. V 2005) 5
Fed. R. Evid.:
Rule 401 ..... 44, 46
Rule 801(d)(1)(A) 4

Miscellaneous:

Restatement (Second) of Judgments (1982) 22, 23
Restatement (Second) of Torts (1977) 45
Howard S. Suskin, *Collateral Estoppel and the Compromise Verdict*, 18 Int'l Soc'y Barristers Q. 354 (1983) 22

In the Supreme Court of the United States

No. 15-537

JUAN BRAVO-FERNANDEZ AND HECTOR MARTINEZ-MALDONADO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 790 F.3d 41. The memorandum and order of the district court (Pet. App. 41a-53a) is reported at 988 F. Supp. 2d 191. A prior opinion of the court of appeals (Pet. App. 59a-133a) is reported at 722 F.3d 1.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 2015. A petition for rehearing was denied on July 27, 2015 (Pet. App. 134a-135a). The petition for a writ of certiorari was filed on October 23, 2015, and was granted on March 28, 2016, limited to question 1. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V.

STATEMENT

Following a jury trial in the United States District Court for the District of Puerto Rico, petitioners were convicted of, *inter alia*, federal program bribery, in violation of 18 U.S.C. 666. Petitioners were sentenced to 48 months of imprisonment, to be followed by three years of supervised release. Bravo-Fernandez Judgment 1-3; Martínez-Maldonado Judgment 1-3. As relevant here, the court of appeals vacated petitioners' bribery convictions on grounds of instructional error and remanded for further proceedings. Pet. App. 59a-133a. On remand, before retrial, the district court denied petitioners' motions for acquittals on the bribery charges under the Double Jeopardy Clause. *Id.* at 41a-53a. The court of appeals affirmed. *Id.* at 1a-40a.

1. From January 2005 until early 2011, petitioner Hector Martínez-Maldonado was a senator for the Commonwealth of Puerto Rico. Pet. App. 61a. Petitioner Juan Bravo-Fernandez was the president of Ranger American, a private security firm in Puerto Rico that provided services such as armored car transportation and security guard staffing. *Ibid.* During the time relevant to this case, Martínez-Maldonado was chairman of the Senate's Public Safety Committee, which had jurisdiction over bills related to the security industry in Puerto Rico. *Id.* at 61a-62a.

In early 2005, Bravo-Fernandez began advocating for legislation that, if enacted, would "provide[] substantial financial benefits" to him. Pet. App. 61a. On

February 23, 2005, he presented a proposed bill, which became Senate Project 410 (SP 410) to Martínez-Maldonado. 2/17/11 Tr. 125, 129-130, 133-145. In early March 2005, Bravo-Fernandez provided a proposed bill that became Senate Project 471 (SP 471) to Martínez-Maldonado. *Id.* at 134-135; Pet. App. 61a. Bravo-Fernandez and Martínez-Maldonado were not friends and had no relationship before Bravo-Fernandez's advocacy for the two bills. 2/23/11 Tr. 80-81; 2/22/11 Tr. 32-33; 2/17/11 Tr. 158-159.

In his role as chairman of the Senate's Public Safety Committee, Martínez-Maldonado "was in a position to exercise a measure of control over the introduction and progression of the bills through the Committee and the Senate." Pet. App. 61a-62a. Another senator, Jorge de Castro Font, was chairman of the Senate's Rules and Calendars Committee, which exercised control over which bills were brought to a vote and when. See *id.* at 63a.

On March 2, 2005, Bravo-Fernandez purchased several tickets for $1000 each to attend a professional boxing match between the popular Puerto Rican boxer Félix "Tito" Trinidad and Ronald Lamont "Winky" Wright, which was scheduled to occur in Las Vegas in May 2005. Pet. App. 62a. Bravo-Fernandez's telephone records from that day reflect that he made multiple calls to de Castro Font and Martínez-Maldonado shortly after he purchased the tickets to the boxing match. 2/23/11 Tr. 102-106; see GX-38; GX-84; GX-87. That same day, Martínez-Maldonado submitted SP 410 for consideration by the Senate. Pet. App. 61a-62a.[1]

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[1] Petitioners state (Br. 5) that "[t]he jury heard evidence that Bravo had invited Martínez [to the boxing match] only as a last-minute replacement" for a friend. But the witness who provided

Later in March 2005, Bravo-Fernandez met with Martínez-Maldonado and an aide to discuss the status of SP 471. 2/17/11 Tr. 150-151. The aide testified that Bravo-Fernandez and Martínez-Maldonado also discussed the trip to Las Vegas to watch the boxing match. *Id.* at 150-153. After Bravo-Fernandez left the office, the aide testified that he told Martínez-Maldonado that it would be improper to accept the trip because Bravo-Fernandez was asking Martínez-Maldonado to pass legislation. *Id.* at 153.

On April 20, 2005, Martínez-Maldonado presided over a Public Safety Committee hearing on SP 471, at which Bravo-Fernandez testified. Pet. App. 62a. The next day, Bravo-Fernandez reserved a hotel room at the Mandalay Bay Hotel in Las Vegas. *Ibid.* Bravo-Fernandez also arranged first-class airline tickets for himself, Martínez-Maldonado, and de Castro Font from Puerto Rico to Las Vegas. *Ibid.* On May 11, 2005, Martínez-Maldonado issued a Committee report in support of SP 471. *Ibid.*

On May 13, 2005, Bravo-Fernandez, Martínez-Maldonado, and de Castro Font flew to Las Vegas and checked into the Mandalay Bay Hotel, where they stayed for two nights in separate rooms. See Pet. App. 62a. Bravo-Fernandez paid for Martínez-Maldonado's room the first night. *Ibid.*[2] The three

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that testimony had earlier testified before the grand jury that Bravo-Fernandez told him he was traveling to Las Vegas with "a political group," mentioning "a couple of Senators." 2/23/11 Tr. 162. The grand jury testimony was admitted at trial as prior inconsistent statements of a declarant under Federal Rule of Evidence 801(d)(1)(A). 2/23/11 Tr. 155-164.

[2] Although de Castro Font paid for Martínez-Maldonado's hotel room the second night, the evidence at trial established that Bravo-Fernandez had been giving cash bribes to de Castro Font

men went out to dinner the first night, with Bravo-Fernandez paying the $495 bill. *Ibid.* The second night, they attended the boxing match, sitting in the $1000 seats purchased by Bravo-Fernandez. *Ibid.*

On May 15, 2005, the three men flew from Las Vegas to Miami, where they stayed at the Marriott South Beach in individual rooms that Bravo-Fernandez paid for, at a total cost of $954.75. Pet. App. 63a. On May 16, 2005, they returned to Puerto Rico. *Ibid.*

On May 17, 2005, de Castro Font scheduled an immediate Senate floor vote on SP 471. Pet. App. 63a. Martínez-Maldonado and de Castro Font both voted in favor of the bill. *Ibid.* The next day, Martínez-Maldonado issued a Committee report supporting SP 410. *Ibid.* On May 23, 2005, de Castro Font scheduled an immediate floor vote on SP 410. *Ibid.* Again, Martínez-Maldonado and de Castro Font voted in favor of the bill. *Ibid.*

2. On June 22, 2010, a federal grand jury in the District of Puerto Rico returned an indictment charging petitioners with federal program bribery, in violation of 18 U.S.C. 666; conspiracy, in violation of 18 U.S.C. 371; and interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952(a)(3)(A) (Travel Act). J.A. 26-52. Martínez-Maldonado was additionally charged with obstruction of justice, in violation of 18 U.S.C. 1512 (2000 & Supp. V 2005). J.A. 26.

Following a jury trial, petitioners were convicted of federal program bribery, in violation of 18 U.S.C. 666. J.A. 89; Pet. App. 4a. The jury acquitted petitioners of conspiring to violate Section 666 and of violating the

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for many years. 2/17/11 Tr. 25-31. In 2009, de Castro Font pleaded guilty to multiple counts of corruption by an elected official and was sentenced to 60 months of imprisonment. Pet. App. 62a n.2.

Travel Act in furtherance of violating Section 666. J.A. 86-88; Pet. App. 4a.[3] The district court sentenced each petitioner to 48 months of imprisonment. Pet. App. 64a.

3. The court of appeals vacated petitioners' federal program bribery convictions, holding that the jury instructions had erroneously permitted the jury to find petitioners "guilty of offering and receiving a gratuity, rather than a bribe." Pet. App. 81a; see *id.* at 105a. As a matter of first impression, and "[u]nlike most circuits to have addressed th[e] issue," the court held that Section 666 criminalizes only quid pro quo bribes, and not gratuities. *Id.* at 60a.

The court of appeals recognized that "significant portions" of the jury instructions and the government's closing argument "were consistent with a bribery theory under [Section] 666," Pet. App. 89a, including Jury Instruction 22, titled "Bribery," which stated that "[b]ribery requires that the government prove beyond

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[3] Bravo-Fernandez was additionally convicted of conspiracy to travel in interstate commerce in aid of racketeering and violating the Travel Act with the intent to promote bribery in violation of Puerto Rico law. J.A. 86-88; see Pet. App. 4a. Martínez-Maldonado was additionally convicted of conspiracy, but the jury "checked 'No' as to each potential object of the conspiracy." Pet. App. 64a; see J.A. 87-88. Following the verdict, the district court granted Bravo-Fernandez's motion for a judgment of acquittal on the Travel Act count because the Puerto Rico bribery statutes that provided the predicate for the violation were repealed before the travel took place. Pet. App. 64a. The court also initially dismissed Martínez-Maldonado's conspiracy conviction in light of the jury's failure to specify an object of the conspiracy, but the court then reinstated the conviction and later declared a mistrial and dismissed the count without prejudice. *Ibid.*

a reasonable doubt the existence of a *quid pro quo* or, in plain English, an agreement that the thing of value that is given to the public official is in exchange for that public official promising to perform official acts for the giver," *id.* at 85a. But the court observed that other language in the jury instructions involving Section 666 stated that the government did not need to prove that an agreement to offer or accept a thing of value was made before the recipient took official action, and thus permitted a finding of guilt based on a reward for a completed act. *Id.* at 82a-90a.

The court of appeals noted that the evidence at trial supported a finding of guilt on both an exchange theory and a gratuity theory. Pet. App. 90a; see *id.* at 5a. Because the court could not say with certainty that the jury did not rely on a gratuity theory, it vacated petitioners' Section 666 convictions and remanded for further proceedings. *Id.* at 104a-105a, 130a.[4]

4. The case returned to the district court for a possible retrial of petitioners on the federal program bribery charges. See Pet. App. 2a (observing that the court of appeals had "remanded for a possible new

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[4] The court of appeals also reversed Bravo-Fernandez's conspiracy conviction, holding that he could not be found guilty of conspiring to travel in interstate commerce to further a violation of Puerto Rico bribery laws because those laws had been repealed before the travel occurred. Pet. App. 108a-120a. In addition, the court reversed the district court's declaration of a mistrial and dismissal of Martínez-Maldonado's conspiracy charge without prejudice, concluding that the district court's initial dismissal of that charge constituted an acquittal, whether "[r]ight[] or wrong[]." *Id.* at 127a. The court of appeals' rulings on the conspiracy convictions are not at issue here.

trial based on a proper theory of liability under [Section] 666").

Before retrial, petitioners moved for judgments of acquittal on the Section 666 offenses under the Double Jeopardy Clause. Pet. App. 41a-42a. Petitioners argued that collateral estoppel precluded retrial on those charges because, in petitioners' view, the jury had necessarily found that they were not guilty of violating Section 666 when it acquitted them of conspiring and traveling with the intent to violate Section 666. *Ibid.*

The district court denied the motions. Pet. App. 41a-53a. The court rejected petitioners' argument that the jury's verdict on the conspiracy and Travel Act charges demonstrated that the jurors had necessarily decided that petitioners did not commit bribery, given that the jury had also convicted petitioners of a standalone bribery offense, and thus "necessarily * * * found all elements of section 666 federal program bribery to be proven beyond a reasonable doubt." *Id.* at 44a. Although those convictions had been vacated for instructional error, the court concluded that they remained a relevant part of the record when "determin[ing] what the jury necessarily decided" for purposes of applying collateral estoppel. *Id.* at 44a n.2.

Considering the convictions and acquittals together, the district court was "not persuaded that it c[ould] glean the underlying facts and theory" that led to the acquittals on the conspiracy and Travel Act counts. Pet. App. 47a. The court explained that "[t]he fact that the jury unanimously found that all elements of the substantive section 666 charge were met when they convicted" on the bribery counts "would seem to

suggest * * * that at least one other element of" the conspiracy and Travel Act charges "was not satisfied." *Id.* at 48a (emphasis omitted). Petitioners' argument "that a rational jury *could not* have found the absence of an agreement, an overt act, or interstate travel" demonstrated only "that the jury acted irrationally and the verdict simply was inconsistent." *Ibid.* Petitioners, the court concluded, therefore could not meet their burden of showing that the "jury necessarily decided the issue of bribery in [their] favor." *Id.* at 53a.[5]

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[5] The district court alternatively held that the verdicts on the conspiracy and Travel Act counts did not actually constitute acquittals, but rather indicated only that the jury had not unanimously agreed that Section 666 was a predicate for those crimes. Pet. App. 46a-47a. The court based that determination on the special verdict form, which listed multiple objects of the conspiracy and predicates for the Travel Act counts and directed the jury to check all that they "unanimously f[ound] to apply" if they concluded that petitioners were guilty. J.A. 86-88. The court reasoned that, although the verdict on those counts demonstrated that "the jury *did not unanimously find* section 666 bribery" to be a predicate for the conspiracy and Travel Act charges, "[t]hat is not equivalent to stating that the jury *unanimously found* that section 666 bribery was *not* the object of the conspiracy or predicate of the travel." Pet. App. 46a-47a. The court concluded that "the jury's check marks could represent hung counts—not acquittals." *Id.* at 47a. Accordingly, the court could not "accept [petitioners'] argument that when the jury checked 'no' as to the federal program bribery predicates for liability [on the conspiracy and Travel Act charges], that was a unanimous acquittal that may be interpreted as such in a double jeopardy issue preclusion analysis." *Id.* at 46a (citation and internal quotation marks omitted). Neither party briefed that issue on appeal and the court of appeals did not address that aspect of the district court's decision.

5. The court of appeals affirmed, holding that the collateral estoppel component of the Double Jeopardy Clause did not bar the government from retrying petitioners on the Section 666 counts. Pet. App. 1a-40a.

Under this Court's decision in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), the court of appeals observed, a defendant who can show that the jury necessarily decided an issue in his favor in a prior prosecution that ended in an acquittal may preclude relitigation of that issue in a subsequent prosecution. Pet. App. 8a, 24a. To determine whether a defendant has carried that burden, *Ashe* directed that courts must examine all relevant record material and assess whether "a 'rational jury,' as a practical matter, decided adversely to the government an issue to be relitigated in the new prosecution." *Id.* at 8a (quoting *Ashe*, 397 U.S. at 444).

The court of appeals recognized that this Court adopted "an important limitation" on preclusion principles in *United States* v. *Powell*, 469 U.S. 57 (1984), which held that collateral estoppel is inapplicable when the jury acts irrationally by returning inconsistent verdicts. Pet. App. 10a. In that situation, "*Powell* concluded[] [that] there is no way to know without speculating which of the inconsistent verdicts—the acquittal or the conviction—the jury really meant," and so collateral estoppel principles "are impossible to apply." *Id.* at 11a (citation and internal quotation marks omitted). The court of appeals noted that, "in light of *Powell*," petitioners did "not deny that a true inconsistency in what the jury has done in acquitting on one offense while convicting on another can make unanswerable *Ashe*'s question about what the jury necessarily decided in rendering the acquittal." *Ibid.*

Applying *Ashe* and *Powell*, the court of appeals concluded that collateral estoppel did not apply because the jury verdicts in petitioners' trial were truly inconsistent. The court observed that "the jury was offered the same theories of [Section] 666 liability as to every count involving [Section] 666, whether as a predicate offense or a standalone crime." Pet. App. 24a. Because the jury had found petitioners guilty of violating Section 666 but not guilty of conspiracy and traveling with the intent to violate Section 666, the court could not "reconcile[] the verdicts." *Ibid.* That inconsistency, the court held, made it impossible to determine that the jury had necessarily decided that petitioners did not commit bribery in violation of Section 666. *Id.* at 15a-36a.[6]

The court of appeals rejected petitioners' argument that the Section 666 convictions could not be considered in determining what the jury decided because those convictions had been vacated for legal error. Pet. App. 15a-20a. *Ashe*, the court observed, "instructed that, for purposes of determining the collateral estoppel effect of acquittals, [courts] must undertake a 'practical' analysis based on the 'record' of the prior proceeding, and with 'an eye to all the circumstances of the proceedings.'" *Id.* at 16a (quoting *Ashe*, 397 U.S. at 444) (citation and internal quotation marks

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[6] Petitioners argued below that the verdicts could be harmonized if the court of appeals concluded that the acquittals represented a rejection of the exchange theory of liability while the convictions represented acceptance of a gratuity theory of liability. The court rejected that argument because the jury had been instructed on a gratuity theory for all the relevant counts and so could not have rationally convicted on some and acquitted on others. See Pet. App. 20a-36a. In this Court, petitioners have abandoned any claim that the verdicts can be reconciled.

omitted). The court reasoned that "[l]ike the acquittals on which [petitioners] rely, the convictions in this case are part of what the jury decided at trial." *Ibid.* "Thus, for purposes of deciding whether the jury necessarily decided that the government failed to prove that [petitioners] violated [Section] 666," the court observed, "the fact [that] the jury also convicted [petitioners] of violating [Section] 666 would seem to be of quite obvious relevance, even though the convictions were later vacated." *Id.* at 17a.

The court of appeals also rejected petitioners' effort to analogize vacated convictions to counts on which a jury has hung, which are not a relevant part of the record for purposes of applying collateral estoppel under *Yeager* v. *United States*, 557 U.S. 110 (2009). Pet. App. 17a. Hung counts cannot "create a 'truly inconsistent' verdict," the court observed, because, as *Yeager* emphasized, they do not constitute jury decisions at all. *Id.* at 18a (citing *Yeager*, 557 U.S. at 121-122). Under that "line of reasoning in *Yeager*," the court of appeals concluded that "vacated counts should be treated differently from hung counts" because "vacated convictions, unlike hung counts, *are* jury decisions, through which the jury *has* spoken." *Ibid.* When such a conviction creates a true inconsistency, the court explained, "*Powell*'s 'prudent acknowledgment' that inconsistent verdicts make it impossible to determine what a jury necessarily decided * * * is not undermined by the mere fact" that the conviction has been vacated. *Ibid.* (quoting *Powell*, 469 U.S. at 65). The court therefore "conclude[d] that vacated convictions, unlike hung counts, are relevant to the *Ashe* inquiry into what a jury necessarily decid-

ed when acquitting on counts related to the vacated convictions." *Id.* at 19a.[7]

SUMMARY OF ARGUMENT

The collateral estoppel component of the Double Jeopardy Clause does not bar a retrial of petitioners on the Section 666 offenses. The jury in the first trial returned irreconcilably inconsistent verdicts, convicting petitioners of violating Section 666 but acquitting them of conspiring and traveling with the intent to violate Section 666. In light of that inconsistency, petitioners have not carried their burden of showing that the jury necessarily decided that they were not guilty of violating Section 666.

A. A defendant seeking to preclude relitigation of an issue under the Double Jeopardy Clause bears the burden of demonstrating, based on a practical and realistic review of the entire record, that the jury in the prior trial necessarily decided the issue in his favor when it acquitted him. In *United States* v. *Powell*, 469 U.S. 57 (1984), this Court held that a defendant cannot satisfy that burden when the jury returns

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[7] The court of appeals also rejected petitioners' separate double jeopardy claim premised on a transcription error in a district court line order, which purported to memorialize the judgments in the first appeal but erroneously stated that petitioners had been acquitted. Pet. App. 37a-39a. The court of appeals concluded that the line order did "not amount to a substantive acquittal by the District Court" because it was "merely intended as a ministerial act to carry out [the court of appeals'] instructions—whatever they may have been—and not an application of law to fact regarding [petitioners'] 'lack of criminal culpability.'" *Id.* at 38a (quoting *Evans* v. *Michigan*, 133 S. Ct. 1069, 1077 (2013)). Petitioners sought to challenge that ruling in this Court, but the Court declined to grant a writ of certiorari on the issue. 136 S. Ct. 1491 (2016).

inconsistent verdicts. In that situation, a defendant cannot show that the acquittal reflects the jury's conclusion that the government had not proved its case. *Powell* accordingly held, in accordance with general preclusion principles, that collateral estoppel does not apply.

In this case, the jury returned irreconcilably inconsistent verdicts by convicting petitioners of violating Section 666 but acquitting them of offenses involving Section 666 as a predicate. Because the district court instructed on the same theories of liability for all counts involving Section 666, no rational jury could have reached those contradictory results. The inconsistent verdicts make it impossible to know what the jury necessarily decided in its acquittals. Petitioners therefore have not met their burden of showing the most essential prerequisite for applying collateral estoppel: that the jury actually resolved facts in their favor.

B. Petitioners cannot avoid that conclusion by noting that their convictions for violating Section 666 were subsequently vacated for instructional error. That error—which applied equally to all of the Section 666 offenses—does not resolve the inconsistency in the verdicts and so cannot provide a basis for viewing the acquittals as reflecting the jury's factual conclusion that petitioners were not guilty of violating Section 666.

1. Petitioners err in relying on *Yeager* v. *United States*, 557 U.S. 110 (2009). That case did not hold, as petitioners assert (Br. 12), "that an acquittal retains its preclusive effect despite any inconsistency with a hung count." Rather, *Yeager* held that a hung count *cannot* be inconsistent with an acquittal because it

does not represent a jury determination at all. *Yeager* emphasized that "a jury speaks only through its verdict" because those are the only decisions that represent the unanimous agreement and collective judgment of all 12 members of the venire. 557 U.S. at 121. A hung count, in contrast, cannot be "evidence of [the jury's] irrationality" because the jury as a whole has failed to agree. *Id.* at 125. Thus, as *Yeager* itself emphasized, a mix of acquittals and hung counts presents "an entirely different context" than "inconsistent *verdicts*." *Id.* at 124. *Yeager* accordingly has no application here, where the jury as a whole acted irrationally by returning irreconcilably inconsistent verdicts.

Petitioners further misread *Yeager* in suggesting that it adopted a rule that events that do not terminate jeopardy must be disregarded when conducting a collateral estoppel inquiry. Logically, many events at trial may fail to terminate jeopardy, yet will inform an inquiry into what the jury necessarily decided for purposes of applying collateral estoppel. By treating those two separate double jeopardy questions as intrinsically linked, petitioners urge a line of reasoning that *Yeager* itself expressly rejected.

2. Principles of finality and respect for the jury's verdict do not support petitioners' suggestion that courts must disregard a jury's inconsistency when applying collateral estoppel. Petitioners base that suggestion on *Powell*, but misunderstand its whole point. *Powell* refused to set aside a conviction that was inconsistent with an acquittal—and so preserved the finality of both verdicts—precisely because in that situation it is impossible to know that the jury necessarily resolved the facts in the defendant's favor, and it is thus unreasonable to treat the acquittal as the

verdict the jury "really meant." 469 U.S. at 68. That rationale does not lose its force when a conviction is vacated for legal error because vacatur does not erase the jury's inconsistency, alter what the jury necessarily decided, or excuse a defendant's inability to answer that question. If a defendant cannot satisfy his burden of showing that the jury decided facts in his favor at the conclusion of the initial trial, as *Powell* held, then he remains unable to show that the jury decided facts in his favor for purposes of applying collateral estoppel in a second trial.

3. Petitioners are also wrong to suggest that this Court has approved a categorical rule that vacated convictions may not be used against a defendant for any purpose. To the contrary, this Court has recognized in a different case involving the Double Jeopardy Clause that an invalid conviction may—despite its unconstitutionality for other purposes—be relied upon to determine what the jury that returned that conviction necessarily decided. See *Morris* v. *Mathews*, 475 U.S. 237 (1986). Lower courts, too, have held in a variety of contexts that vacated convictions may reveal what the jury necessarily determined in its other verdicts or provide other relevant and admissible evidence in subsequent proceedings. Contrary to petitioners' suggestion, the court of appeals' decision below fits comfortably with precedent.

C. Policy arguments do not support petitioners' contention that courts should ignore a jury's inconsistency when applying collateral estoppel. Petitioners maintain that without the availability of collateral estoppel in this context prosecutors would be encouraged to overcharge cases and press unreasonable interpretations of criminal statutes. But petitioners of-

fer no evidence that prosecutors strategically overcharge and adopt indefensible interpretations of statutes in hopes of obtaining an inconsistent verdict so as to defeat the application of collateral estoppel in any ensuing retrial. And such speculative policy arguments—which rest on a highly attenuated causal chain—cannot excuse petitioners' inability to show that the jury necessarily found facts in their favor.

Petitioners' policy arguments also ignore the significant interests in permitting retrial when a conviction is vacated for legal error. Those interests deserve respect here, where the evidence supported a bribery conviction on a proper theory, the jury was instructed on that theory, the jury returned a conviction for bribery, and petitioners have not shown that the jury necessarily found that they did not commit bribery.

ARGUMENT

COLLATERAL ESTOPPEL DOES NOT APPLY BECAUSE THE INCONSISTENT VERDICTS PREVENT PETITIONERS FROM SATISFYING THEIR BURDEN OF SHOWING THAT THE JURY NECESSARILY DECIDED THAT THEY WERE NOT GUILTY OF VIOLATING SECTION 666

Petitioners cannot carry their burden of showing that the jury in their first trial necessarily determined that they were not guilty of bribery in violation of Section 666. The jury returned inconsistent verdicts, making it impossible to determine that the jury resolved that issue in petitioners' favor. Nor does it matter that the convictions were subsequently vacated for unrelated legal error. Vacatur of the convictions does not erase the historical fact of the jury's inconsistency and does nothing to establish that the jury that convicted petitioners of violating Section 666

necessarily found that they were not guilty of that offense. The court of appeals thus correctly held that collateral estoppel does not apply.

A. The Inconsistent Verdicts In Petitioners' First Trial Prevent Them From Showing That The Jury Necessarily Decided That They Did Not Commit Bribery

1. The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. In *Ashe* v. *Swenson*, 397 U.S. 436 (1970), this Court interpreted the Clause to incorporate the principle of collateral estoppel, which "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443; see *id.* at 445.

To establish that the collateral estoppel component of the Double Jeopardy Clause applies, "[t]he burden is 'on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding.'" *Schiro* v. *Farley*, 510 U.S. 222, 233 (1994) (quoting *Dowling* v. *United States*, 493 U.S. 342, 350 (1990)); see *id.* at 232, 236 (rejecting defendant's reliance on collateral estoppel because he had "not met his burden of establishing the factual predicate for the application of the doctrine" by showing that the issue of intent to kill "was actually and necessarily decided in [his] favor"). If multiple "possible explanations for the jury's acquittal verdict at [the] first trial" exist, a defendant cannot satisfy that burden because he cannot show that any particular issue "was determined in [his] favor." *Dowling*, 493 U.S. at 352.

To determine what a jury in a prior trial has necessarily decided, this Court's "cases require an examination of the entire record," *Schiro*, 510 U.S. at 236, "taking into account the pleadings, evidence, charge, and other relevant matter," *Ashe*, 397 U.S. at 444. The Court has explained that "[t]he inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Ibid.* (quoting *Sealfon* v. *United States*, 332 U.S. 575, 579 (1948)). "[T]he rule of collateral estoppel in criminal cases," the Court has emphasized, must be applied with "realism and rationality." *Ibid.*

The Court has further clarified that "[t]o identify what a jury necessarily determined at trial, courts should scrutinize a jury's decisions, not its failures to decide." *Yeager* v. *United States*, 557 U.S. 110, 122 (2009). Thus, *Yeager* held that "[a] hung count is not a 'relevant' part of the 'record of [the] prior proceeding.'" *Id.* at 121 (second set of brackets in original) (quoting *Ashe*, 397 U.S. at 444). "Because a jury speaks only through its verdict," the Court reasoned, "its failure to reach a verdict cannot—by negative implication—yield a piece of information that helps put together the trial puzzle." *Ibid.*

In contrast, courts have held that convictions from the same jury are relevant under *Ashe* because they may reveal that the jury either did or did not resolve a particular issue in the defendant's favor when acquitting on a related count. In *Schiro*, for example, this Court considered whether the defendant's conviction for felony murder reflected a jury finding that he did not have an intent to kill, and ultimately concluded that the verdict "did not necessarily depend on a finding" of lack of intent. 510 U.S. at 235; see, *e.g.*, *Flittie*

v. *Solem*, 775 F.2d 933, 941-942 (8th Cir. 1985) (rejecting argument that prior acquittal on murder charge necessarily decided that defendant was not an after-the-fact participant so as to preclude a subsequent prosecution on an accessory charge because the same jury had convicted the defendant of conspiracy based on his post-murder conduct), cert. denied, 475 U.S. 1025 (1986); *United States* v. *Neal*, 822 F.2d 1502, 1507-1508 (10th Cir. 1987) (holding that jury did not necessarily decide that the defendant had not paid kickbacks when acquitting him on one count of mail fraud so as to preclude a subsequent prosecution for perjury because the same jury had convicted him on other counts involving payment of kickbacks).

2. a. As the court below recognized, this Court's precedents establish "an important limitation on the application of the rule of collateral estoppel" when a jury has reached inconsistent verdicts in the prior proceeding. Pet. App. 10a. When an acquittal is inconsistent with a conviction on a related count—such as when a jury acquits on a predicate offense but convicts on a compound offense—the Court has observed that it is impossible to determine what the jury necessarily decided in acquitting, making "principles of collateral estoppel * * * no longer useful." *United States* v. *Powell*, 469 U.S. 57, 68 (1984).

As *Powell* explained, "[i]nconsistent verdicts * * * present a situation where 'error,' in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored." 469 U.S. at 65. A defendant cannot establish that "the acquittal on the predicate offense was proper—the one the jury 'really meant,'" because "[i]t is equally possible that the jury, convinced of guilt,

properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense." *Id.* at 65, 68. The Court has accordingly declined to treat the acquittal as "show[ing] that [jurors] were not convinced of the defendant's guilt.'" *Id.* at 63 (quoting *Dunn* v. *United States*, 284 U.S. 390, 393 (1932)). The "inconsistency is reason, in itself, for not giving preclusive effect to the acquittal[]" in a subsequent prosecution. *Standefer* v. *United States*, 447 U.S. 10, 23 n.17 (1980).

Indeed, to the extent that any meaning can be attributed to an acquittal that is inconsistent with a conviction, this Court has recognized that the most likely explanation is that the jury believed the defendant was guilty of both counts but should only be punished for one crime. *Powell*, 469 U.S. at 65 ("[S]uch inconsistencies often are a product of jury lenity."); see *United States* v. *Maybury*, 274 F.2d 899, 902 (2d Cir. 1960) (Friendly, J.) (recognizing that "in a criminal case the jury has the power to bring in a verdict in the teeth of both law and facts" and may return inconsistent verdicts because it believed that by doing so it would "prevent the punishment from getting too far out of line with the crime") (citation and internal quotation marks omitted). The Court accordingly "interpret[s] the acquittal as no more than [the jurors'] assumption of a power which they had no right to exercise, but to which they were disposed through lenity." *Dunn*, 284 U.S. at 393 (citation omitted). The possibility that the jury "acquit[ted] out of compassion" fortifies the conclusion that the inconsistent verdicts did not necessarily resolve facts in the defendant's favor. *Standefer*, 447 U.S. at 22.

b. This Court's recognition that inconsistent verdicts cannot trigger collateral estoppel accords with general preclusion principles. "The estoppel doctrine * * * is premised upon an underlying confidence that the result achieved in the initial litigation was substantially correct." *Standefer*, 447 U.S. at 23 n.18; see Restatement (Second) of Judgments § 29 cmt. f (1982) (Restatement). "Where a determination relied on as preclusive is itself inconsistent with some other adjudication of the same issue, that confidence is generally unwarranted." Restatement § 29 cmt. f (explaining rationale for rule that non-mutual collateral estoppel does not apply when the judgment that would be given preclusive effect is inconsistent with another prior judgment). And particularly where the same jury returns inconsistent verdicts in a single proceeding, there can be no doubt that "error * * * most certainly has occurred." *Powell*, 469 U.S. at 65 (internal quotation marks omitted).

In the civil context, that type of error precludes application of the estoppel doctrine. For example, courts may decline to afford preclusive effect to a verdict that "was the result of compromise" rather than a rational application of the jury instructions and the law. Restatement § 28 cmt. j; see, *e.g.*, Howard S. Suskin, *Collateral Estoppel and the Compromise Verdict*, 18 Int'l Soc'y Barristers Q. 354, 354 (1983) ("Although courts will not set aside a jury verdict merely because it is the product of compromise, courts usually conclude that a jury compromise affords a basis for avoiding the collateral estoppel effect of an unimpeached and otherwise valid verdict.") (footnote omitted). So too in the criminal context, collateral estoppel is "predicated on the assumption that the

jury acted rationally and found certain facts in reaching its verdict." *Powell*, 469 U.S. at 68. Because that assumption does not hold when a jury's decision to acquit is inconsistent with its decision to convict, collateral estoppel cannot apply. *Ibid.*

The rule that collateral estoppel is inapplicable when a court lacks confidence in the correctness of the original adjudication carries particular force in the criminal context given the government's inability to appeal from an erroneous acquittal. "It is of course true that verdicts induced by passion and prejudice are not unknown in civil suits," but "post-trial motions and appellate review provide an aggrieved litigant a remedy." *Standefer*, 447 U.S. at 23. And a civil litigant who was deprived of the right to obtain review of the judgment may avoid collateral estoppel on that basis alone. Restatement § 28(1). Although the absence of appellate review of acquittals does not prevent the application of collateral estoppel in a criminal case, it heightens the need to "refuse[] the protection" of the doctrine when its premise "that a criminal jury ha[s] acted in a rational manner" is demonstrably refuted by inconsistent verdicts. *Powell*, 469 U.S. at 66 n.7.

3. Applying these principles here, petitioners cannot carry their burden of demonstrating that the jury in the first trial—which convicted them of violating Section 666—necessarily determined that they did not violate Section 666.

Petitioners contend (Br. 17) that the jury must have found that they "did not commit the predicate [Section 666] offense" when it declined to convict them of conspiring and traveling to violate Section 666. But if the jury necessarily determined that petitioners

were not guilty of a Section 666 offense, it could not rationally have convicted them of that offense. "[T]he jury was offered the same theories of [Section] 666 liability as to every count involving [Section] 666," Pet. App. 24a, yet the same 12 jurors who unanimously voted to convict on a standalone Section 666 crime unanimously voted to acquit on the offenses involving Section 666 as a predicate. As the court of appeals analyzed at length, and as petitioners no longer dispute, see note 6, *supra*, those verdicts are irreconcilably inconsistent. Pet. App. 20a-36a.[8] In light of that inconsistency, "[t]he most that can be said" about the jury's verdicts in this case is that "either in the acquittal[s] or the conviction[s] the jury did not speak their real conclusions, but that does not show that they were not convinced of [petitioners'] guilt." *Powell*, 469 U.S. at 63 (citation omitted).

Petitioners' argument to the contrary "necessarily assumes that the acquittal[s]" on offenses involving Section 666 as a predicate "w[ere] proper—the one[s] the jury 'really meant.'" *Powell*, 469 U.S. at 68. But it is at least "equally possible"—if not far more likely—that the jury "properly reached" the conclusion that petitioners were guilty of a Section 666 violation and acquitted on the related charges "through mistake,

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[8] Because the jury convicted petitioners on the predicate Section 666 crime and declined to convict on the related conspiracy and Travel Act crimes, the court of appeals noted the possibility that the jury might have found that the government failed to prove elements unique to the related crimes. Pet. App. 12a-15a. But the court concluded that the verdicts would nevertheless be inconsistent because, on the facts of the case, "the independent elements of travel and agreement for the conspiracy and Travel Act counts involving [Section] 666 necessarily overlapped with elements of [Section] 666 itself." *Id.* at 14a; see *id.* at 15a n.5.

compromise, or lenity." *Id.* at 65. Petitioners' contention that the jury necessarily found that they were not guilty of violating Section 666 thus rests on "pure speculation," *id.* at 66—which does not suffice to carry their burden of showing that the jury resolved the issue in their favor. The inconsistent verdicts make it impossible to know what the jury actually decided, and "principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict"—therefore "are no longer useful." *Id.* at 68.

B. Courts Need Not Disregard Convictions That Have Been Vacated In Determining What The Jury That Returned Those Convictions Necessarily Decided

Petitioners urge the Court to ignore the inconsistent verdicts in their prior trial because the jury's determination that they were guilty beyond a reasonable doubt of violating Section 666 was vacated for instructional error. Although that error applied equally to all offenses involving Section 666 and so does nothing to resolve the inconsistency in the jury's verdicts or restore confidence that the jury acted rationally in acquitting, see Pet. App. 20a-36a, petitioners contend that courts must automatically disregard a conviction that has been vacated when assessing what an acquittal in conflict with that conviction necessarily decided. That argument lacks merit.

1. Petitioners' reliance on Yeager *is misplaced*

Petitioners principally rest their argument on *Yeager*, which they contend (Br. 18) held that "acquittals retain their preclusive effect under *Ashe* even if the jury acted inconsistently in hanging on other counts." But petitioners misread the case. *Yeager* con-

cluded that hung counts cannot be inconsistent with jury verdicts—and so cannot undermine the presumption of jury rationality—because they do not constitute jury decisions at all. 557 U.S. at 121-125. Because hung counts are fundamentally different from vacated convictions in that respect, *Yeager*'s analysis has no application here.

a. In *Yeager*, the defendant faced trial on various charges of fraud and insider trading based on allegations that he had made false and misleading statements about his company and sold stock while in possession of material, non-public information. 557 U.S. at 114. The jury acquitted him of the fraud charges, which the court of appeals there determined must have reflected a finding that he "did not have any insider information that contradicted what was presented to the public." *Id.* at 116 (citation omitted). But the jury was unable to reach a verdict on the insider trading counts, and the government accordingly sought to retry the defendant on those hung counts. Applying *Ashe*, this Court held that, under the collateral estoppel component of the Double Jeopardy Clause, "if the possession of insider information was a critical issue of ultimate fact in all of the charges against [the defendant], a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element." *Id.* at 123.

In concluding that collateral estoppel applied, *Yeager* rejected the argument that the jury had acted irrationally by failing to reach a verdict—rather than also acquitting—on the insider trading counts. 557 U.S. at 124-125. Whereas "[a] jury's verdict of acquittal represents the community's collective judgment

regarding all the evidence and arguments presented to it," the Court observed that "there is no way to decipher what a hung count represents." *Id.* at 121-122. The Court accordingly dismissed the notion that "a mistried count can, in context, be evidence of irrationality." *Id.* at 124-125. "[T]he fact that a jury hangs is evidence of nothing," the Court observed, "other than, of course, that it has failed to decide anything." *Id.* at 125. Thus, "[b]ecause a jury speaks only through its verdict," the Court held that "its failure to reach a verdict cannot—by negative implication—yield a piece of information that helps put together the trial puzzle." *Id.* at 121.

b. i. Petitioners contend (Br. 22) that *Yeager*'s rationale applies equally to convictions that have been vacated because "the jury has not spoken in a way the law recognizes as legitimate and worthy of public respect." That misconstrues *Yeager*'s point.

Yeager emphasized that a jury "speaks only through its verdict" to contrast decisions that can be attributed to the jury as a whole with hung counts, which do not represent the jury's collective view and so shed no light on how all 12 members of the venire evaluated the arguments and evidence in the case. Based on that distinction, *Yeager* concluded that a hung count cannot constitute "evidence of [the jury's] irrationality," 557 U.S. at 125, because, by definition, the jury as a whole has failed to agree on anything. In that situation, a court can conclude that the verdict of acquittal is "the one the jury 'really meant,'" *Powell*, 469 U.S. at 68, because it is the only decision that garnered the jurors' unanimous agreement.

As petitioners point out (Br. 35-36), the government argued in *Yeager* that "a jury that acquits on

some counts while inexplicably hanging on others is not rational." 557 U.S. at 124. But the Court rejected that argument by emphasizing that "courts should scrutinize a jury's decisions, not its failures to decide." *Id.* at 122. A hung count, the Court noted, can be explained by factors such as "exhaustion after a long trial," which would mean not that the jury was irrational, but that it ended deliberations because of fatigue. *Id.* at 121. "To ascribe meaning to a hung count," the Court concluded, "would presume an ability to identify which factor was at play in the jury room," a matter of "guesswork." *Id.* at 121-122. The only collective action in *Yeager*—and thus the only relevant evidence of what the jury as a whole necessarily decided at trial—was the unanimous acquittal. *Yeager* accordingly did not hold, as petitioners assert (Br. 36), that "collateral estoppel applies despite any inconsistency between the hung counts and the acquittals"; rather, it held that a hung count *cannot* be inconsistent with an acquittal because it is not a jury decision at all.

In contrast to a hung count, a jury's decision to convict represents the unanimous judgment of jurors on the merits of the charge. If that decision to convict is irreconcilably inconsistent with the jury's simultaneous decision to acquit on a related count, the conviction is evidence that the jury as a whole has acted irrationally, even if the conviction must subsequently be set aside for unrelated legal error. Here, for example, all 12 jurors voted to convict petitioners of a standalone Section 666 offense, indicating that the entire jury was "convinced that the Government ha[d] proven each of the [elements of the crime] beyond a reasonable doubt." J.A. 71. But those same 12 jurors

turned around and declined to convict petitioners of the related offenses involving Section 666, suggesting that the entire jury was *not* "convinced that the Government ha[d] proven the [elements of a Section 666 offense] beyond a reasonable doubt." J.A. 63, 66. Those jury decisions are indisputably inconsistent. As *Yeager* itself recognized, inconsistent verdicts therefore present "an entirely different context" than a mix of acquittals and hung counts. 557 U.S. at 124; see *ibid.* (observing that hung counts "are not similar to jury verdicts in any relevant sense").

Petitioners accordingly misread *Yeager* in asserting (Br. 35-38) that courts analyzing a collateral estoppel claim must always find that a jury acted rationally, even when the jury's verdicts conclusively demonstrate that it did not. *Yeager* shows that the Court begins with the presumption that the jury was rational, just as the Court ordinarily presumes that a jury has followed its instructions. See, *e.g.*, *Blueford* v. *Arkansas*, 132 S. Ct. 2044, 2051 (2012). But when all 12 jurors vote to return irreconcilably inconsistent verdicts, "'error,' in the sense that the jury has not followed the court's instructions, most certainly has occurred." *Powell*, 469 U.S. at 65. The "assumption that the jury acted rationally and found certain facts in reaching its verdict" of acquittal is therefore overcome. *Id.* at 68.

Petitioners are also wrong to contend (Br. 21) that "*Yeager* necessarily presumed that the 'jury verdicts' from which hung counts fundamentally differed were valid and final jury verdicts." The finality of a conviction has no inherent connection to the question whether that conviction provides "evidence of irrationality." *Yeager*, 557 U.S. at 125. In some cases, of course, the

existence and nature of a legal error may resolve an apparent inconsistency in the jury's verdicts. If, for example, the judge "order[s] [the jury] to return a guilty verdict" on one count but not on another, Pets. Br. 23, that error may explain the discrepancy in the verdicts. Or if a jury receives an erroneous instruction on the count of conviction but the correct instruction on the charge on which it acquits, the instructional error may reconcile the verdicts. But as this case illustrates, inconsistent verdicts may be entirely disconnected from any legal error in the proceeding and so not explainable on that ground. Here, the jury received the same flawed jury instructions on all counts involving Section 666, so that instructional error does not explain the inconsistent verdicts or establish what petitioners must show—that the acquittals represent the jury's "real conclusions." *Powell*, 469 U.S. at 64 (citation omitted).

ii. Petitioners repeat their error by relying (Br. 28-30) on *Yeager*'s observation that "there is no way to decipher what a hung count represents." 557 U.S. at 121. *Yeager* focused on whether a court could "ascribe meaning to a hung count" to determine whether it could, "in context, be evidence of irrationality." *Id.* at 121, 125. Because "the fact that a jury hangs is evidence of nothing—other than, of course, that it has failed to decide anything," the Court held that hung counts are too inconclusive to create a true inconsistency with "a unanimous verdict that the jurors did return." *Id.* at 122, 125. But as just noted, convictions *are* evidence of something because they represent the collective decision of the jury as a whole. Because convictions signal the unanimous vote of all 12 jurors to find guilt beyond a reasonable doubt, no "guess-

work" or "conjecture" is required to decipher their meaning. *Id.* at 122. Thus, in contrast to hung counts, convictions can be "logically inconsistent" with accompanying acquittals "on their face." *Id.* at 125.

Petitioners raise a red herring (Br. 28-29) by observing that the instructional error in this case makes it impossible to determine whether the jury believed petitioners were guilty of an exchange or a gratuity when the jury convicted them of violating Section 666. That is beside the point because it does nothing to eliminate the inconsistency in the jury's verdicts. The erroneous instructions applied to all of the Section 666-based offenses, and a rational jury therefore could not have reached conflicting conclusions on petitioners' guilt of those offenses. The convictions accordingly reveal the jury's inconsistency—which is the relevant issue here—even if they do not reveal which theory of liability jurors relied upon in reaching those inconsistent verdicts.

Petitioners' example proves the point. Petitioners speculate (Br. 30)—with no basis in the record—that "all 12 jurors might have thought petitioners guilty of a gratuity, while none thought them guilty of an exchange." But if that is what all 12 jurors thought, then the jury should have convicted petitioners of conspiring and traveling in interstate commerce to violate Section 666, because they were told that a gratuity theory sufficed for liability on those offenses as well. The instructional error does not make sense of the jury's failure to convict, nor does it provide any clue about what motivated the jury to reach inconsistent determinations. Petitioners accordingly cannot rely on the instructional error as a basis to ignore the

inconsistency when determining which facts the jury necessarily found in reaching its verdicts.

Petitioners' argument ultimately reduces to a claim that collateral estoppel applies because the government cannot show that the jury necessarily resolved the bribery issue *against* them when it unanimously voted to convict. But that turns the *Ashe* inquiry on its head. It is petitioners who bear the burden of unequivocally showing that the jury necessarily decided the bribery issue *in their favor*. Because the jury returned inconsistent verdicts, they cannot meet that burden here.

iii. Petitioners further misread *Yeager* by contending (Br. 24-28) that it adopted a rule that events occurring at trial that do not terminate jeopardy must be disregarded when conducting *Ashe*'s collateral estoppel inquiry. As petitioners observe (Br. 26), "[i]t has long been settled * * * that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction." *Lockhart* v. *Nelson*, 488 U.S. 33, 38 (1988) (citing *United States* v. *Ball*, 163 U.S. 662, 671-672 (1896)). The Court has treated a second trial as a continuation of the original jeopardy, recognizing that the defendant "has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished." *Burks* v. *United States*, 437 U.S. 1, 15 (1978). Petitioners assert (Br. 24) that, because a vacated conviction is "a nonevent for th[e] * * * double jeopardy purpose[]"

of terminating jeopardy, it is "equally irrelevant to the *Ashe* analysis."

That argument conflates two distinct components of the Double Jeopardy Clause, which focus on different issues, serve different purposes, and arise under different portions of the Clause's text. The continuing jeopardy principle implicates the defendant's "interest in avoiding multiple trials" and requires a determination of whether he has been "put in jeopardy 'twice.'" *Yeager*, 557 U.S. at 118-119. The collateral estoppel principle serves a separate "interest in preserving the finality of the jury's judgment" and trains on the distinct question whether "it is appropriate to treat" two crimes as "the 'same offence'" within the meaning of the Clause. *Ibid.* Petitioners' effort to blur together those separate double jeopardy doctrines has no grounding in the Clause's text or function.

Nor does petitioners' argument make sense as a matter of logic. Any number of events may occur at trial that fail to terminate jeopardy yet help illuminate the basis of a jury's verdict for purposes of applying collateral estoppel. Jeopardy does not terminate the moment an indictment issues, but the charging document can help to determine what a jury has necessarily decided. *Ashe*, 397 U.S. at 444. Jeopardy does not terminate when the trial court instructs the jury, but those instructions can clarify the basis for the jury's decision. *Schiro*, 510 U.S. at 234-235. Jeopardy does not terminate when witnesses testify, but that evidence may reveal what issues were in dispute and thus necessarily resolved by the jury. *Ashe*, 397 U.S. at 444. Jeopardy likewise does not terminate when a conviction is vacated for legal error on appeal, but the vacated conviction may nevertheless be relevant when

considering what the jury that unanimously voted to return that conviction necessarily decided.

It does not matter that, for purposes of continuing jeopardy, a vacated conviction has been "wholly nullified and the slate wiped clean." *North Carolina* v. *Pearce*, 395 U.S. 711, 721 (1969). That "conceptual abstraction[]" explains why a retrial does not transgress the double jeopardy "protect[ion] against a second prosecution for the same offense after conviction." *Id.* at 717, 721 n.18. But the Court's recognition that a vacated conviction is nullified for purposes of permitting retrial neither changes the historical fact that the jury in the first trial returned that verdict nor alters what that jury necessarily decided.

Yeager cannot reasonably be read to support petitioners' argument. As petitioners note (Br. 24-25), *Yeager* referred to a hung count as a "nonevent" both in describing why retrial generally is permitted when the jury fails to reach a verdict and in concluding that hung counts are not relevant to a collateral estoppel analysis because they do not constitute jury decisions. 557 U.S. at 118, 120. But while *Yeager* observed that a mistrial is not "an event of significance" in either of those distinct double jeopardy contexts, *id.* at 124, it did not draw a causal link between them. For purposes of the *Ashe* inquiry, *Yeager* made clear, a hung count is a "nonevent" not because it fails to terminate jeopardy but because "a jury speaks only through its verdict" and "the fact that a jury hangs is evidence of nothing—other than, of course, that it has failed to decide anything." *Id.* at 121, 125. For the reasons described above, a conviction that reflects the jurors' unanimous agreement and collective judgment on the merits of the charge cannot be characterized as a

"nonevent" in the way *Yeager* deemed relevant, even if that verdict must be set aside on appeal for legal error.

Petitioners are also wrong to rely (Br. 25) on *Yeager*'s rejection of the government's separate argument in that case that collateral estoppel does not apply when a defendant remains in continuing jeopardy because a retrial does not qualify as a successive prosecution. *Yeager* clarified that collateral estoppel and continuing jeopardy are distinct doctrines. 557 U.S. at 117-119. Because collateral estoppel is an independent component of the Double Jeopardy Clause, it can preclude relitigation of issues that were necessarily decided in a prior proceeding, even if the defendant's original jeopardy did not terminate. *Id.* at 118-119. By treating continuing jeopardy and collateral estoppel as intrinsically linked, petitioners press the very line of reasoning that *Yeager* rejected.

2. Principles of finality and respect for the jury's verdict do not require courts to disregard a jury's inconsistency when applying collateral estoppel

Petitioners contend (Br. 35) that courts should ignore a jury's inconsistent verdicts when determining what that jury necessarily decided to show "respect for the finality" of the acquittal. Although they rest that argument on *Powell*, the Court's analysis in *Powell* squarely forecloses their claim.

a. To recap, *Powell* reaffirmed a long line of cases holding that a criminal defendant may not obtain reversal of a conviction on grounds that it is inconsistent with a verdict of acquittal returned by the same jury. 469 U.S. at 62-63; see *Harris* v. *Rivera*, 454 U.S. 339, 346 (1981) (per curiam); *United States* v. *Dotterweich*, 320 U.S. 277, 279 (1943); *Dunn*, 284 U.S. at 393. In that situation, the Court reasoned, the basis

of the jury's inconsistent determinations is unknowable. The Court further deemed it "imprudent and unworkable" to interpret the inconsistent verdicts case by case, noting that "[c]ourts have always resisted inquiring into a jury's thought processes." *Powell*, 469 U.S. at 66-67. "[T]hrough this deference," the Court reasoned, "the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality." *Id.* at 67. Thus, while the defendant in *Powell* "wa[s] given the benefit of her acquittal on the counts on which she was acquitted," the Court observed that "it is neither irrational nor illogical to require her to accept the burden of conviction on the counts on which the jury convicted." *Id.* at 69.

In reaching that conclusion, the Court specifically rejected the defendant's argument that the conviction should be set aside based on principles of collateral estoppel. *Powell*, 469 U.S. at 68-69. That argument, the Court explained, "simply misunderstands the nature of the inconsistent verdict problem." *Id.* at 68. The defendant wanted the Court to look at the acquittal in isolation and assume that it necessarily resolved facts in her favor. She could not make that showing, however, in light of the inconsistent conviction, which indicated that the jury had resolved facts against her. "The problem is that the same jury reached inconsistent results," the Court concluded, and "once that is established principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful." *Ibid.*

b. Petitioners are wrong to assert (Br. 32) that *Powell* "commands the conclusion" that an acquittal

that is inconsistent with a conviction must nevertheless be given preclusive effect to avoid "[i]mpugn[ing]" the jury's judgment.

i. Petitioners' reading of *Powell* contradicts this Court's whole point that it is impossible to say that the acquittal resolved facts in the defendant's favor when the jury returns inconsistent verdicts. There can be no ambiguity about *Powell*'s rationale; the Court made the point again and again. Thus, the Court observed that "inconsistent verdicts * * * should not necessarily be interpreted as a windfall to the Government at the defendant's expense" because it is "equally possible" that "the inconsistent verdicts may favor the criminal defendant." 469 U.S. at 65. Or in other words: "[I]t is unclear whose ox has been gored." *Ibid.* Or in still other words: It "is not necessarily correct" that "the acquittal * * * [i]s proper—the one the jury 'really meant'" because "all we know is that the verdicts are inconsistent." *Id.* at 68. And again: "The most that can be said . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." *Id.* at 64-65 (quoting *Dunn*, 284 U.S. at 393).

Nothing about *Powell*'s rationale changes when the inconsistent conviction is vacated for legal error (putting aside those errors that themselves explain the inconsistency, see pp. 29-30, *supra*). An unrelated legal error does not clarify which facts the jury found in reaching inconsistent verdicts. Nor does the error erase the historical fact that the jury as a collective unit acted irrationally. For purposes of applying collateral estoppel, therefore, the error does not alleviate—

and should not excuse—the defendant's inability to carry his burden of showing that the jury necessarily decided facts in his favor.

Petitioners emphasize (Br. 32-33) *Yeager*'s observation that *Powell* "declined to use a clearly inconsistent verdict to second-guess the soundness of another verdict" and instead concluded that "respect for the jury's verdicts counseled giving each verdict full effect, however inconsistent." *Yeager*, 557 U.S. at 124-125. But those descriptions merely reflect *Powell*'s holding that a defendant may not rely on the jury's inconsistency to obtain reversal of her otherwise-valid conviction. *Yeager* did not purport to overrule the rationale underlying that holding—namely, that courts should not infer from the acquittal that the jury necessarily found the defendant not guilty in light of the jury's irreconcilably inconsistent finding of guilt beyond a reasonable doubt.

ii. Petitioners likewise fail to establish (Br. 31) that *Powell*'s rationale is inapplicable in "the context of a re-prosecution." If inconsistent jury verdicts make it impossible to know that the jury necessarily decided facts in the defendant's favor at the conclusion of the first trial, as *Powell* held, then it is equally impossible to know that the jury necessarily decided facts in the defendant's favor for purposes of applying collateral estoppel in a second trial. In that situation, as this Court has previously recognized, the "inconsistency is reason, in itself, for not giving preclusive effect to the acquittals." *Standefer*, 447 U.S. at 23 n.17.

Indeed, *Powell* contemplated that the acquittals in that case would not have preclusive effect to foreclose retrial on the counts of conviction if the convictions were set aside. The court of appeals in *Powell* had

reversed the convictions based on the inconsistency, thereby preventing re-prosecution on those counts. See *United States* v. *Powell*, 708 F.2d 455, 457 (9th Cir. 1983), rev'd, 469 U.S. 57 (1984). In this Court, the government argued that the "outright reversal" was improper because, even if the convictions were invalidated, "the inconsistency in the verdict" meant that "the basis of the jury's acquittal cannot satisfactorily be determined" and "the doctrine of collateral estoppel [would] not preclude a new trial." U.S. Br. at 30 n.37, *Powell*, *supra* (No. 83-1307). Although *Powell* ultimately held that the inconsistent convictions need not be overturned, the Court appeared to agree that a contrary ruling would mean that "the defendant [would] receive a new trial on the conviction[s]"—rather than reversal—"as a matter of course." 469 U.S. at 65.

iii. Nor can petitioners escape *Powell*'s rationale by observing (Br. 34) that "[a]n acquittal is the most sacrosanct verdict of all under the Double Jeopardy Clause." There is no dispute that a verdict of acquittal is final and unassailable. An acquittal accordingly cannot be invalidated even if it is inconsistent with a conviction and therefore "likely to be the result of mistake, or lenity." *Powell*, 469 U.S. at 68; see, *e.g.*, *Evans* v. *Michigan*, 133 S. Ct. 1069, 1074 (2013) (observing that an acquittal stands even if it is "based upon an egregiously erroneous foundation") (citation omitted). In that manner, the verdict of acquittal is given "full effect." *Yeager*, 557 U.S. at 124.

But as *Powell* recognized, an acquittal's special status does not make it any easier to determine what a jury has necessarily decided when the jury issues inconsistent verdicts. See 469 U.S. at 65-66. And petitioners' observation (Br. 1) that an acquittal is a "sac-

rosanct, final judgment, immune from any subsequent impeachment" in fact "strongly militates against giving an acquittal preclusive effect" because the government lacks an "avenue to correct errors" in that judgment. *Standefer*, 447 U.S. at 23. The government's inability to appeal an erroneous acquittal makes it all the more important to hold petitioners to their burden of demonstrating that the prerequisites for applying collateral estoppel are satisfied. *Powell*, 469 U.S. at 65.

iv. In all events, petitioners' invocation of respect for the jury's verdict rings hollow given that they ask this Court to ignore the jury's unanimous decision that they were guilty of violating Section 666 and instead conclude from an inconsistent part of the verdict that the jury necessarily found that they were *not* guilty of violating Section 666.

As petitioners point out, their Section 666 convictions had to be vacated for instructional error, so the jury did not necessarily find them guilty of an exchange theory of bribery. But the jury instructions included the exchange theory, J.A. 70-77, and the government presented sufficient evidence to support conviction on a proper quid pro quo theory, Pet. App. 90a. Accordingly, all 12 jurors may well have found that petitioners committed bribery in violation of Section 666 under a valid theory when they unanimously voted to convict.[9] Principles of respect for and deference to

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[9] Notably, the jury separately convicted Bravo-Fernandez of traveling in interstate commerce with the intent to commit bribery in violation of Puerto Rico law, J.A. 88, and the jury instructions on that count (in contrast to the instructions concerning Section 666) made clear that the bribery offense required a quid pro quo exchange, J.A. 69, 77. The conviction involving Puerto Rico bribery thus cuts against petitioners' speculation (Br. 29) that "all 12

the jury do not warrant transforming that conviction into an acquittal that the jury itself declined to return.

3. Vacated convictions are a relevant part of the trial record when determining what a jury necessarily decided

Petitioners further urge the Court to disregard the jury's inconsistent verdicts by adopting a "categorical rule" that a "vacated conviction may not be used to the defendant's detriment." Pets. Br. 40 (citation and brackets omitted). Petitioners assert (Br. 39) that, "[t]o [their] knowledge, this Court has never held that a vacated conviction can be used against a defendant for any purpose." But, in fact, this Court and lower courts have recognized in a variety of contexts that vacated convictions may illuminate what the jury necessarily decided or provide other relevant evidence admissible in a subsequent prosecution.

a. i. Petitioners' suggestion that unconstitutional convictions may not be relied upon for any purpose contravenes this Court's decision in *Morris* v. *Mathews*, 475 U.S. 237 (1986). In *Morris*, a defendant who had been convicted of aggravated robbery was subsequently tried and convicted of aggravated murder based on the same incident. *Id.* at 240-241. As the case came to this Court, it was clear that the successive prosecution for aggravated murder, which required proof of ag-

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jurors might have agreed that petitioners were not guilty of an 'exchange'" had they been properly instructed on the Section 666 counts. Although the district court subsequently reversed the conviction because the relevant Puerto Rico bribery statute was repealed shortly before the travel took place, Pet. App. 64a, that unrelated error does not undermine the inference that the jurors found guilt beyond a reasonable doubt on an exchange theory of bribery.

gravated robbery, violated the Double Jeopardy Clause. *Id.* at 244. The resulting conviction therefore was unconstitutional and could not stand. *Ibid.* But it was also clear that a prosecution for the lesser-included offense of simple murder would not violate double jeopardy. *Ibid.* The State accordingly sought to reduce the jeopardy-barred aggravated murder conviction to a conviction for murder. *Id.* at 245. The defendant, in contrast, argued that he was entitled to a new trial, reasoning that "because the trial for aggravated murder should never have occurred, the Double Jeopardy Clause bar[red] the State from taking advantage of the jeopardy-barred conviction by converting it into a conviction for the lesser crime of murder." *Ibid.*

In analyzing the parties' arguments, this Court observed that it was "clear that the jury necessarily found that the defendant's conduct satisfie[d] the elements of the lesser included offense" of murder when it convicted him of aggravated murder. *Morris*, 475 U.S. at 247. Thus, although that conviction was unconstitutional, the Court relied on it to determine what the jury had necessarily decided. And reliance on the invalid conviction worked to the defendant's detriment, because the Court concluded that it was appropriate to enter a conviction on the lesser-included offense of murder that the jury had necessarily found rather than grant the defendant a new trial, unless he could demonstrate that "but for the improper inclusion of the jeopardy-barred charge, the result of the proceeding probably would have been different." *Ibid.*

Lower courts, too, have recognized that convictions that have been vacated may provide relevant information about what the jury necessarily decided. In

United States v. *Christensen*, No. 08-50531, 2015 WL 11120665 (9th Cir. July 8, 2016), for example, the court vacated the defendant's convictions for violating the Computer Fraud and Abuse Act of 1986 (CFAA), 18 U.S.C. 1030, based on instructional error. 2015 WL 11120665 at *13. The court then considered whether to vacate the defendant's convictions for identity theft, which required the jury to find criminal intent under either the CFAA or a parallel state-law statute. *Id.* at *15. To resolve that question, the court considered what the vacated CFAA convictions revealed about the jury's factfinding. *Id.* at *17. "Even though those convictions must be set aside," the court observed, "the facts that the jury necessarily found in returning those guilty verdicts clearly evince intent under" the state statute. *Ibid.* Thus, because the vacated convictions demonstrated that the jury necessarily found facts that would establish a violation of the state statute, the court affirmed the identity theft convictions. See *ibid.*; see also, *e.g.*, *Brennan* v. *United States*, 867 F.2d 111, 115-116 (2d Cir.) (relying on vacated wire fraud convictions to conclude that the jury had necessarily decided that certain telephone calls had occurred in the conduct of an enterprise for purposes of upholding the defendant's conviction for violating the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*), cert. denied, 490 U.S. 1022 (1989).

The Third Circuit relied on a vacated conviction for a similar purpose in *United States* v. *Velasquez*, 885 F.2d 1076 (1989), cert. denied, 494 U.S. 1017 (1990)—and in that case it benefitted the defendant. The defendant in *Velasquez* was convicted of conspiracy, which could have been based on a jury finding that she conspired with a co-defendant or with other unnamed

individuals. *Id.* at 1091. If the jury had convicted her of conspiring with the co-defendant, the conviction would need to be reversed because there was insufficient evidence that the co-defendant had joined the conspiracy. *Id.* at 1090-1091. But if the jury found that she had conspired with other unnamed individuals, the conviction could stand. *Id.* at 1091. To help clarify the basis of the conviction, the court noted that the same jury had also convicted the co-defendant of conspiracy. *Ibid.* Although that conviction had been vacated for insufficient evidence, the court considered it a relevant part of the record because it showed "a substantial likelihood that the jury's verdict finding [the defendant] guilty of conspiracy was based on an impermissible determination that she conspired with the [co-defendant]." *Ibid.* Thus, the court relied on the co-defendant's vacated conviction to help illuminate the basis of a separate verdict returned by the same jury.

ii. Courts have also recognized that vacated convictions can have "relevan[ce]" in subsequent proceedings in the sense that they have the "tendency" to make a material fact "more or less probable than it would be without" the convictions. Fed. R. Evid. 401.[10] For example, this Court has held that the existence of a vacated conviction may defeat an action for malicious prosecution because the conviction, although it has been set aside, provides evidence that there was probable cause for the prosecution. See *Crescent City Live*

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[10] This illustrates another difference between hung counts and vacated convictions. See *Yeager*, 557 U.S. at 121 (observing that "[e]ven in the usual sense of 'relevance,' a hung count hardly 'make[s] the existence of any fact more probable or less probable'") (second set of brackets in original) (quoting Fed. R. Evid. 401).

Stock Co. v. *Butchers' Union Slaughter-House Co.*, 120 U.S. 141, 160 (1887) (faulting the lower court for "failing to give due effect" to a vacated conviction as evidence that probable cause existed); see also, *e.g.*, *Harris* v. *Bornhorst*, 513 F.3d 503, 520 (6th Cir.) (summarizing Ohio rule that "a finding of guilty of a criminal offense by a court having jurisdiction to try and dispose of the case, *even though later and finally reversed by a reviewing court*, raises a conclusive presumption of probable cause and constitutes a complete defense in a later action for malicious prosecution brought by the defendant in the criminal case against the instigator thereof") (citation omitted), cert. denied, 554 U.S. 903 (2008); *Mosley* v. *Wilson*, 102 F.3d 85, 91 (3d Cir. 1996) (observing that courts may rely on a conviction that was overturned to find probable cause on the "rationale * * * that a guilty verdict establishes 'that the person who initiated the proceedings had reasonable grounds for so doing'") (quoting Restatement (Second) of Torts § 667(1) cmt. b (1977)).

In addition, courts have concluded that vacated convictions may be relevant, admissible evidence in a subsequent proceeding to prove facts such as a defendant's motive, intent, or plan, or to establish the conviction's effect on the victim's state of mind. For example, the Ninth Circuit concluded that a defendant's prior rape conviction, which had been reversed for instructional error, was properly admitted in a later rape prosecution to show the defendant's intent and plan, where the two crimes were committed in a similar manner. *United States* v. *Sneezer*, 983 F.2d 920, 924 (1992) (per curiam), cert. denied, 510 U.S. 836 (1993). Similarly, the Fifth Circuit rejected a defendant's challenge to the admission of a vacated robbery

conviction at his murder trial, reasoning that the vacated conviction was admitted "only for the purpose of showing motive" to kill the victim, who was a witness against the defendant in the robbery prosecution. *Russell* v. *Lynaugh*, 892 F.2d 1205, 1212 (1989), cert. denied, 501 U.S. 1259 (1991). And the Eleventh Circuit approved the admission of a vacated murder conviction in a subsequent prosecution of the defendant for violating the Hobbs Act, 18 U.S.C. 1951, because the vacated conviction "was relevant to the victim's state of mind" by showing that he reasonably feared the defendant. *United States* v. *Blanton*, 793 F.2d 1553, 1564-1565, cert. denied, 479 U.S. 1021 (1986). Other examples abound. See, *e.g.*, *United States* v. *Wagner*, 989 F.2d 69, 73-74 (2d Cir. 1993) (relying on vacated drug conviction to find probable cause for a wiretap, and observing that the reversal of the conviction "on technical grounds does not affect its probity as to probable cause"); *Newport News Shipbuilding & Dry Dock Co.* v. *NLRB*, 738 F.2d 1404, 1407 n.4 (4th Cir. 1984) (relying on strikers' convictions for strike misconduct even though "[m]any of the convictions were subsequently overturned" because the vacated convictions were "probative of [the employer's] 'honest belief' that [the strikers] had committed acts which justified suspension or discharge").

A vacated conviction that is inconsistent with an acquittal is similarly relevant to a collateral estoppel inquiry because it makes the existence of a material fact—that the jury necessarily decided issues in the defendant's favor—"less probable." Fed. R. Evid. 401. The "government's theory" is not, as petitioners assert (Br. 43), "that the vacated convictions embody a factual finding of guilt." Rather, the theory is that pe-

titioners cannot meet *their* burden of establishing that the acquittals necessarily embody a factual finding of innocence because, as a matter of historical fact, the jury returned inconsistent verdicts.[11] In deeming vacated convictions a relevant part of the record for that limited purpose, the court of appeals acted well within precedent.

b. More fundamentally, petitioners' suggestion that courts must automatically ignore vacated convictions when assessing what a jury necessarily decided contradicts *Ashe*. As the Court emphasized in that case, "the rule of collateral estoppel in criminal cases" must be applied "with realism and rationality," taking into account "all the circumstances of the proceedings." 397 U.S. at 444 (citation omitted). Errors that occur at trial are themselves a relevant circumstance of the proceeding that may help to establish what the jury necessarily decided. For example, if a jury is improperly instructed on the elements of a crime, those erroneous instructions may establish that a particular issue was not even submitted to the jury for resolution—

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[11] Petitioners' cases (Br. 38-43) holding that courts may not rely on vacated convictions as evidence of the defendant's guilt for purposes of imposing collateral consequences are therefore inapposite. The vacated convictions here are relevant not to establish guilt, but to establish the jury's inconsistency. It is therefore wholly beside the point that "vacated convictions have no collateral estoppel effect." Pets. Br. 40. The government is not seeking to rely on the jury's convictions on the Section 666 counts to collaterally estop petitioners from proving a fact in future litigation. Rather, petitioners are attempting to rely on the acquittals to collaterally estop retrial for a Section 666 offense. The Section 666 convictions are relevant not because they should be given preclusive effect, but because they show the acquittals should *not* be accorded that effect in light of the jury's inconsistent verdict.

let alone necessarily decided by the jury's verdict.[12] A court conducting the "practical" inquiry commanded by *Ashe*, *ibid.* (citation omitted), similarly need not disregard a conviction that demonstrates that the jury returned inconsistent verdicts, even if the conviction is set aside for unrelated legal error. After all, *Ashe* underscored that collateral estoppel applies to facts found by "a rational jury," *ibid.*—and focusing on what a rational jury has done makes sense only if the jury has, in fact, acted rationally.

Ashe further emphasized that courts must evaluate the record of the prior proceedings with "realism" and not strain to hypothesize conceivable bases for the jury's decision that lack footing in the on-the-ground facts of the proceeding. 397 U.S. at 444. Thus, courts should not conclude that "the jury may have disbelieved substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest" so as to deny preclusive effect to an acquittal on the theory that it did not necessarily resolve the sole issue in dispute. *Id.* at 444 n.9 (citation omitted). But that practical inquiry works both ways. It would be equally improper here to look at the acquittals in isolation and pretend that the jury necessarily found that petitioners were not guilty of violating Section 666 when the same jury simultaneously returned a conviction finding them guilty of that very offense.

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[12] Imagine, for example, that the trial court in this case had erroneously instructed the jury only on a gratuity theory, without mentioning an exchange theory at all. Under *Ashe*, those erroneous instructions would surely be relevant to show that the jury did not necessarily determine that petitioners did not engage in a quid pro quo exchange.

C. Petitioners' Policy Arguments Do Not Justify Ignoring The Inconsistency In A Jury's Verdicts When Conducting A Collateral Estoppel Inquiry

Petitioners contend (Br. 50) that courts should ignore a jury's inconsistent verdicts when determining whether collateral estoppel applies in order to deter prosecutors from "overcharg[ing] cases and * * * push[ing] far-reaching interpretations of criminal statutes." Those policy arguments lack merit and provide no basis for applying collateral estoppel when its essential predicate—the ability to say what a jury necessarily determined in its acquittal—is missing.

1. At the outset, petitioners cite no persuasive evidence that prosecutors routinely overcharge cases or urge unwarranted interpretations of criminal offenses in hopes of obtaining inconsistent verdicts so that they can avoid the application of collateral estoppel in a subsequent prosecution. Indeed, it is fanciful to suggest that prosecutors craft their indictments and statutory arguments in anticipation of a possible *retrial* in a case. A prosecutor who pursues unnecessary and duplicative charges or who urges an indefensible interpretation of a statute risks confusing jurors and increasing the likelihood that they will use their unreviewable ability to acquit out of lenity "as a check against arbitrary or oppressive exercises of power by the Executive Branch." *Powell*, 469 U.S. at 65; see *Standefer*, 447 U.S. at 22. And a prosecutor who gambles on obtaining a retrial faces the risk that "[t]he passage of time may make it difficult or impossible for the Government to carry [its] burden" of proving guilt beyond a reasonable doubt. *United States* v. *Loud Hawk*, 474 U.S. 302, 315 (1986); see, *e.g.*, *Engle* v. *Isaac*, 456 U.S. 107, 127-128 (1982) ("Passage of time,

erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible."). Prosecutors are not likely to take those risks and strategically overreach simply to try to obtain an inconsistent verdict and thereby avoid collateral estoppel in any retrial.[13]

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[13] Petitioners contend (Br. 47) that "[i]t is not hard to find recent and extreme examples of blatant overcharging," but the cases they cite (Br. 47-48) do not prove the point. In *United States* v. *Flanders*, 752 F.3d 1317 (11th Cir. 2014), cert. denied, 135 S. Ct. 1188 (2015), for example, the defendants fraudulently lured young women to Florida for a supposed acting audition, drugged the victims, engaged in sex acts with them while they were in a semi-conscious and unconscious state, and then sold pornographic videos of those assaults online. *Id.* at 1326. Petitioners express indignation that the defendants were convicted of "sex trafficking by fraud"—that is, fraudulently enticing the women to come to Florida where they were drugged and assaulted—and "benefitting by participating in a venture that commits sex trafficking by fraud"—that is, selling videos of the assaults. Pets. Br. 47-48 (citation omitted). But those convictions clearly penalize different aspects of the defendants' conduct and cannot fairly be characterized as overcharging. The same is true of petitioners' other examples. See *United States* v. *Anderson*, 783 F.3d 727, 738 (8th Cir.) (finding no "redundancy" in convictions for conspiracy to commit arson—which "is aimed at punishing persons acting in concert to commit an offense"—and using fire in the commission of the conspiracy offense—which "focuses on punishing those who make criminal use of fire") (citation and internal quotation marks omitted), cert. denied, 136 S. Ct. 199, 136 S. Ct. 200, and 136 S. Ct. 347 (2015); *United States* v. *Garcia*, 754 F.3d 460, 475 (7th Cir.) (observing that Congress clearly intended to "provide for multiple punishments for the same act" when it enacted 18 U.S.C. 924(c), which prohibits the use of a firearm in relation to a crime of violence, and that assault with a dangerous weapon in furtherance of a racketeering enterprise is "just the sort of 'crime of violence' that Congress wanted to include within [Section] 924(c)'s ambit"), cert. denied, 135 S. Ct. 395 and 135 S. Ct. 467 (2014), 135 S. Ct. 988 and 135 S. Ct. 991 (2015). In any event, there is no evidence that

In that respect, this case bears no resemblance to the prosecution in *Ashe* that prompted this Court to hold that the Double Jeopardy Clause incorporates the principle of collateral estoppel. In *Ashe*, the State sequentially prosecuted the defendant for robbing multiple victims in a single criminal incident, going to trial first on only one count involving one victim and then, when that trial ended in an acquittal, pressing forward with a second trial for robbing another victim. 397 U.S. at 437-439. In the process, the State deliberately honed its trial strategy to shore up its case in light of the acquittal, "treat[ing] the first trial as no more than a dry run for the second prosecution." *Id.* at 447. This Court recognized that collateral estoppel should apply to curb that kind of "unfair and abusive reprosecution[]." *Id.* at 445 n.10. Here, in contrast, the government brought all its charges in a single prosecution, with no indication that prosecutors strategically sought "multiple bites at the apple." Pets. Br. 51.[14] Petitioners' policy arguments do not warrant

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prosecutors in those cases pursued multiple charges in an effort to avoid collateral estoppel if the jury returned inconsistent verdicts, nor any evidence that the prosecutors even considered that possibility.

[14] Petitioners are wrong to assert (Br. 50-51) that their prosecution is an example of overcharging and unreasonable statutory interpretation. Contrary to their characterization, there is nothing unusual or pernicious about charging a defendant with both conspiracy and the substantive offense. And as the court of appeals recognized, "most circuits to have addressed th[e] issue" have concluded that Section 666 criminalizes gratuities, demonstrating that the proper interpretation of the statute is subject to reasonable debate. Pet. App. 60a; see *id.* at 96a-97a (citing cases from the Second, Seventh, and Eighth Circuits holding that Section 666 covers gratuities because it "prohibits one from corruptly offering a thing of value with intent to 'influence *or reward*' an agent, and

distorting the doctrine of collateral estoppel by ignoring inconsistent verdicts that demonstrate that it should not apply.

2. Petitioners' policy arguments further ignore the weighty interests in permitting retrial when a defendant succeeds in having his conviction set aside for legal error.

"[R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case." *Burks*, 437 U.S. at 15. The Court has recognized that "[i]t would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *Ibid.* (quoting *United States* v. *Tateo*, 377 U.S. 463, 466 (1964)). Indeed, it is "at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution." *Tateo*, 377 U.S. at 466. The rule that retrial is permitted after a conviction is vacated for legal error thus has important "implications * * * for the sound administration of justice." *Ibid.*

Petitioners accordingly start from the wrong baseline in asserting (Br. 2) that "[t]he government should never benefit from having obtained an unlawful conviction" and that retrial would be "antithetical to a fair system of criminal justice." Vacatur of petitioners' convictions for instructional error does not "immuni[ze]

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prohibits an agent from corruptly soliciting or demanding a thing of value with intent to be 'influenced *or rewarded*'").

[them] from punishment," *Burks*, 437 U.S. at 15 (citation omitted), but rather entitles them only to be tried on a narrower theory. A retrial following vacatur based on instructional error is therefore the default rule—part of the "one full and fair opportunity" prosecutors should have to obtain a conviction of those who have violated the law. *Arizona* v. *Washington*, 434 U.S. 497, 505 (1978). There is no injustice in applying that rule here, where the evidence at trial supported conviction on a valid bribery theory, the jury returned a conviction for bribery, and petitioners have not carried their burden of showing that the acquittals necessarily reflect a factual determination that they were not guilty of bribery.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

JUAN BRAVO-FERNANDEZ AND
HECTOR MARTÍNEZ-MALDONADO,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the First Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

REPLY 1

I. *Yeager* Requires Reversal 2

II. *Powell* Requires Reversal 9

III. Vacated Convictions Are Legal Nullities 15

IV. The Decision Below Invites Prosecutorial Abuse 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Ashe v. Swenson,
397 U.S. 436 (1970) 2, 4, 18, 20

Benton v. Maryland,
395 U.S. 784 (1969) 16

Brennan v. United States,
867 F.2d 111 (2d Cir. 1989) 19

Butler v. Eaton,
141 U.S. 240 (1891) 13, 18

Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co.,
120 U.S. 141 (1887) 17

Fiswick v. United States,
329 U.S. 211 (1946) 4, 15

Flittie v. Solem,
775 F.2d 933 (8th Cir. 1985) 12

Harris v. Bornhorst,
513 F.3d 503 (6th Cir. 2008) 19

Johnson v. Mississippi,
486 U.S. 578 (1988) 17, 19

Morris v. Mathews,
475 U.S. 237 (1986) 16

TABLE OF AUTHORITIES—continued

Page(s)

Mosley v. Wilson,
102 F.3d 85 (3d Cir. 1996) 19

Newport News Shipbuilding & Dry Dock Co. v. NLRB,
738 F.2d 1404 (4th Cir. 1984) 19

North Carolina v. Pearce,
395 U.S. 711 (1969) 6

Russell v. Lynaugh,
892 F.2d 1205 (5th Cir. 1989) 19

Schiro v. Farley,
510 U.S. 222 (1994) 11, 12

Singleton v. City of New York,
632 F.2d 185 (2d Cir. 1980) 19

Standefer v. United States,
447 U.S. 10 (1980) 12

United States v. Blanton,
793 F.2d 1553 (11th Cir. 1986) 19

United States v. Christensen,
2015 WL 11120665 (9th Cir. Aug. 25, 2015) 20

United States v. Neal,
822 F.2d 1502 (10th Cir. 1987) 12

TABLE OF AUTHORITIES—continued

Page(s)

United States v. Powell,
469 U.S. 57 (1984) ..... *passim*

United States v. Sneezer,
983 F.2d 920 (9th Cir. 1992) 19

United States v. Velasquez,
885 F.2d 1076 (3d Cir. 1989) 18, 19

United States v. Wagner,
989 F.2d 69 (2d Cir. 1993) 20

Yeager v. United States,
557 U.S. 110 (2009) ..... *passim*

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 6

STATUTES

18 U.S.C. § 666 ..... *passim*

OTHER AUTHORITIES

Fed. R. Evid. 404(b) 19

Restatement (Second) of Judgments 15

REPLY

The jury returned four valid verdicts—acquittals finding petitioners not guilty of conspiring and traveling to violate 18 U.S.C. § 666. Standing alone, those acquittals end this case. The government nonetheless argues that they lose their preclusive effect because the jury also convicted petitioners of violating § 666. Reading the government's brief, one might not grasp that those convictions were vacated. One might even think that the "jury was convinced that the Government had proven each of the elements of the crime beyond a reasonable doubt." U.S. Br. 28. Never mind that the district court misinformed the jury on the main element of the crime. And never mind if in the next case the court misinforms the jury on every element of the crime.

One also might not grasp from the government's brief that *Yeager v. United States*, 557 U.S. 110 (2009), is still good law. The government advances argument after argument that *Yeager* forecloses. And even had *Yeager* never been decided, the decision below is wrong. Only in some bizarro constitution would a conviction that violates the Fifth Amendment's Due Process Clause eliminate the protections of the same Amendment's Double Jeopardy Clause. Only in Alice in Wonderland would a nonevent under the Double Jeopardy Clause—an unconstitutional conviction—be a monumentally significant event under the Double Jeopardy Clause. At bottom, the government urges a constitutional rule that although Lance Armstrong may have cheated and Prohibition has been repealed, Armstrong is still a winner and drinking martinis is still a crime. This Court should decline to treat invalid convictions as anything other than what they are—legal nullities.

I. *Yeager* Requires Reversal

1. *Yeager* holds that hung counts are "non-event[s]" that are not "a 'relevant' part of the 'record'" under *Ashe v. Swenson*, 397 U.S. 436 (1970). *Yeager*, 557 U.S. at 120-21. And because hung counts "have no place in the issue preclusion analysis," only acquittals matter. *Id.* at 122. The same is true of vacated convictions. Like hung counts, vacated convictions lack "finality" and "have never been accorded respect as a matter of law or history." *Id.* at 122-24. *Ashe* asks only what the jury "determined by a valid and final judgment." *Id.* at 119 (quoting *Ashe*, 397 U.S. at 443). Because the government has never disputed that the acquittals here, standing alone, preclude retrial, petitioners satisfied their burden under *Ashe*.

The government argues that *Yeager* is limited to hung counts because *Yeager* reasoned that only "jury verdicts" count in the *Ashe* analysis. On the government's theory, "verdicts" command respect because they reflect "collective action," including convictions vacated because the jury was misinstructed on the elements of the crime. Br. 28. But the government gives away its case when it explains *why* a jury's collective action matters. Br. 27-29. Validity is baked into every sentence. The government argues that vacated convictions differ from hung counts because verdicts reflect valid findings of guilt. Thus, the government argues that courts should consider vacated convictions because "all 12 members of the venire" reached "unanimous" and "collective judgment" on "the merits of the charge" and the "arguments and evidence in the case." Br. 27-28, 34. The government reasons that here "all 12 jurors voted to convict petitioners of a standalone Section 666

offense, indicating that the entire jury was convinced that the Government had proven each of the elements of the crime beyond a reasonable doubt." Br. 28 (alterations omitted).

But there is no such "unanimous" or "collective judgment" here because the jury was misinstructed on the "elements of the crime," *i.e.*, the "merits of the charge" and the "arguments and evidence in the case." Vacated convictions are not "similar to jury verdicts in any *relevant* sense." *Yeager*, 557 U.S. at 124 (emphasis added). The jury's "unanimous" decision here is entitled to no more respect than a jury's "unanimous" decision to order pizza for lunch. Neither reflects a determination that anyone committed a crime.

The government's "collective judgment" mantra implodes when applied to convictions unanimously rendered by an 11-person jury, 12 minors, a jury including the victim's sister, or a jury excluding African-Americans. Pet. Br. 23. And the government's rule extends to verdicts invalidated for any reason, even if the court told the jury that bribery occurs whenever citizens breathe. As long as the errors apply equally to the acquittals and the convictions (U.S. Br. 30), its rule extends to all prejudicial and structural errors, no matter how numerous or egregious, including coerced confessions, withholding of conclusive exculpatory DNA evidence, or jury instructions to convict no matter what or based on a preponderance. Convictions, however, are vacated because they deserve no respect and undermine the public's faith and trust in our criminal justice system. As such, the law regards them as if they never occurred. Reversible errors "impeach the convic-

tion"—full stop. *Fiswick v. United States*, 329 U.S. 211, 223 (1946).

And if the question is what the jury thought about the "merits of the charge," U.S. Br. 28, 34, hung counts are if anything more meaningful than vacated convictions. Hung counts may reflect a finding of guilt by at least one juror under the correct law, while for all we know zero jurors thought petitioners guilty under the correct law. Pet. Br. 28-29. The government does not respond.

Conceding that vacated convictions lack "finality," the government disputes that "finality" was essential to *Yeager*'s dismissal of hung counts. The government claims that the "finality of a conviction has no inherent connection to the question whether the conviction provides 'evidence of irrationality.'" Br. 29 (quoting *Yeager*, 557 U.S. at 125). But hung counts provide no evidence of irrationality because they do not bring "an element of needed finality." *Yeager*, 557 U.S. at 124. Finality is inherently connected to a verdict's *validity*, which is why finality is essential to collateral estoppel. *Id.* at 118, 122-24. Again, courts under *Ashe* look only at "final and valid judgment[s]." 397 U.S. at 443.

It is irrelevant if a rational jury that acquitted petitioners of violating § 666 under the conspiracy and travel charges should have acquitted on the standalone § 666 charges. U.S. Br. 23-24. This was equally true in *Yeager*, 557 U.S. at 116, and the hung counts, if considered, undermined the defendant's reliance on the acquittals just the same as the government argues the vacated convictions do here. Yet *Yeager* rejected the dissent's view, resurrected here (U.S. Br. 44 & n.10, 46, 48), that the Court "pretend[ed]" the acquittals meant something they

"probab[ly]" did not and that "a failure to reach a verdict on one count 'make[s] the existence' of a factual finding on a necessary predicate for both counts substantially 'less probable.'" 557 U.S. at 132 & n.3 (Scalia, J., dissenting) (quoting Fed. R. Evid. 401).

The government denies that, under *Yeager*, "collateral estoppel applies despite any inconsistency between the hung counts and the acquittals," Br. 28 (quoting Pet. Br. 36), and instead reads *Yeager* to hold that a "hung count *cannot* be inconsistent" with an acquittal. *Id.* But *Yeager* framed the "question presented" as whether the jury's "apparent inconsistency ... affect[ed] the preclusive force of the acquittals." 557 U.S. at 112. The answer was no. *Yeager* did not question that a rational jury that acquitted Yeager of fraud should have acquitted him of insider trading as well. Had *Yeager* concluded otherwise, the opinion would be largely superfluous, particularly the discussion of *Powell*. The Court held that a hung count "*cannot* be inconsistent" only in the sense that it is not cognizable or relevant evidence of inconsistency. The same is true here: invalid convictions "*cannot* be inconsistent" with valid acquittals because the former are nullities.

2. Vacated convictions are irrelevant nonevents for collateral estoppel because they are irrelevant nonevents for continuing jeopardy. Pet. Br. 24-28. It blinks reality to suggest that *Yeager* did not "link" these aspects of double jeopardy. U.S. Br. 34. *Yeager* regarded *Richardson*'s conclusion that hung counts are non-events for continuing jeopardy as a "rejection" of the government's argument that hung counts are "event[s] of significance" for collateral estoppel. 557 U.S. at 123-24; *see id.* at 118, 120 (linking "nonevent[s]" for both doctrines); Pet. Br. 25-26.

Contrary to the government's argument (Br. 33), no "text" in the Double Jeopardy Clause supports treating the same event as irrelevant for one component of the analysis but controlling for another. Double jeopardy protects defendants against being "subject for [1] the same offence to be [2] twice put in jeopardy," U.S. Const. amend. V; both requirements apply in every case. But even were the government correct that only "same offence" matters for collateral estoppel and only "twice put in jeopardy" matters for continuing jeopardy, Br. 33, the government identifies no textual distinction between those two phrases that supports differential treatment of vacated convictions.

This Court should not render the Clause internally inconsistent by perversely declaring vacaturs irrelevant only when doing so benefits prosecutors. Cato Br. 9. Continuing jeopardy is an extra-textual, government-friendly gloss in which this Court permits retrial after vacated convictions and hung counts even though defendants have literally been put in "jeopardy" merely by standing trial. The Court treats the proceedings as if they never happened—they are "wholly nullified and the slate wiped clean." *North Carolina v. Pearce*, 395 U.S. 711, 720-21 (1969); Pet. Br. 22, 26 (collecting cases). *Pearce* did not hold that a vacated conviction is nullified only "for purposes of continuing jeopardy." U.S. Br. 34. *Pearce* said "wholly nullified," not "partly."

Tellingly, the government in *Yeager* saw continuing jeopardy and collateral estoppel as inextricably linked. It argued that, "because a defendant remains in continuing jeopardy on hung counts, the collateral estoppel component of the double jeopardy clause does not bar retrial," and decried "attempt[s] to whol-

ly divorce collateral estoppel from the surrounding and independently valid double jeopardy principles [] such as [continuing jeopardy]." Brief for the United States at 23, 28, *Yeager v. United States*, 557 U.S. 110 (2009) (No. 08-67) ("U.S. *Yeager* Brief") (capitalization omitted). Now that *Yeager* accepted the linkage but held that it defeats the government's argument, 557 U.S. at 123-24, the government's flip-flop is particularly unconvincing.

The government notes that events like indictments or witness testimony do not terminate jeopardy, but nonetheless "help illuminate the basis of a jury's verdict" under *Ashe*. Br. 33. True, but irrelevant. Continuing jeopardy analysis concerns *trial-ending* events that are treated as non-events for terminating jeopardy. No analogue for indictments or witness testimony exists because those events do not even arguably trigger a second jeopardy. Because the law does not ignore those events in continuing jeopardy analysis, there is no reason they should be ignored in collateral estoppel analysis.

3. The final consideration compelling *Yeager*'s holding—that "there is no way to decipher what a hung count represents," 557 U.S. at 121—equally applies to vacated convictions. Pet. Br. 28-30. The government contends that, "[b]ecause convictions signal the unanimous vote of all 12 jurors to find guilt beyond a reasonable doubt, no 'guesswork' or 'conjecture' is required to decipher their meaning." Br. 30-31 (quoting *Yeager*, 557 U.S. at 122). Again, this argument collapses if one inserts "vacated" or "invalid" before "convictions," or inserts "of giving a lawful gratuity" after "guilt." *Cf.* U.S. Br. 48 n.12.

Petitioners' convictions, too, are indecipherable. The First Circuit vacated them because the instruc-

tions permitted the jury to convict based on lawful conduct. The court could not say, without guessing, that the convictions reflected a conclusion that petitioners violated § 666. Pet. Br. 29. The government occasionally acknowledges this uncertainty. Br. 31 ("impossible to determine [what] the jury believed" in convicting); Br. 40 (jury "did not necessarily" find guilt under correct law). But the government does not confront the problem this creates for its position. Instead it pivots, contending that the inability to decipher the meaning of the vacated convictions "does nothing to eliminate the inconsistency in the jury's verdicts." Br. 31. Again, that was equally true of the hung counts in *Yeager*.

It is impossible to discern the effect of these unlawful instructions. They may have produced disagreement that led to a conviction out of compromise, whereas a properly instructed jury otherwise would have acquitted (or at least hung, in which case *Yeager* would control). Pet. Br. 29-30. The government does not disagree. The government calls this "speculat[ion]" (Br. 31), but that is precisely the problem. *Yeager* disregarded hung counts *because* no one could "identify which factor was at play in the jury room." 557 U.S. at 121-22.

The government's theme that defendants bear the "burden" of proving what the jury necessarily decided (Br. 9, 13, 14, 17, etc.) is misdirection. Again, the government does not dispute that, absent consideration of the vacated convictions, petitioners have met their burden. *Yeager* observed that considering hung counts would have created an impossible burden. 557 U.S. at 122 n.6. Likewise, the Court should not force defendants to "rebut all inferences about *what may* have motivated the jury to [unlawfully

convict] without the ability to seek conclusive proof." *Id.*

II. *Powell* Requires Reversal

1. *Powell* held that a defendant cannot overturn a valid conviction on one count on the ground that the same jury in the same trial acted inconsistently in acquitting on another count. *United States v. Powell*, 469 U.S. 57, 69 (1984). In the government's view, the "whole point" of *Powell* is that "it is impossible to say that the acquittal resolved facts in the defendant's favor when the jury returns inconsistent verdicts." Br. 37. Because the jury at petitioners' 2011 trial "acted irrationally" in returning inconsistent verdicts, the government contends, collateral estoppel is as inappropriate here as it was in *Powell*. Br. 37; *accord* Br. 23-25.

Yeager rejected this exact argument. Relying on *Powell*, the government in *Yeager* argued that "if a single finding of fact would dictate acquittal on two counts, and the jury acquits on one and hangs on the other, the jury has not acted consistently or rationally," and thus "[c]ollateral estoppel cannot be applied." U.S. *Yeager* Brief 17; *see Yeager*, 557 U.S. at 124 (describing the government's argument).

Yeager rejected that analysis as "serious[ly] flaw[ed]" because the government "misreads" *Powell*. 557 U.S. at 124-25. Despite "jury verdicts that, on their face, were logically inconsistent," *Powell* "refused to impugn the legitimacy of either verdict," reasoning that "the jury's verdict 'brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality.'" *Yeager*, 557 U.S. at 124 (quoting *Powell*, 469 U.S. at 67). If one valid verdict cannot impugn another valid

verdict, "*a fortiori*" a hung count cannot strip an acquittal of preclusive effect. *Id.* at 125. In other words, *Powell*'s logic commanded *Yeager*'s holding.

The government ignores that *Yeager*'s holding follows "*a fortiori*" from *Powell*. The government merely acknowledges "*Yeager*'s observation that *Powell* 'declined to use a clearly inconsistent verdict to second-guess the soundness of another verdict' and instead concluded that 'respect for the jury's verdicts counseled giving each verdict full effect, however inconsistent.'" Br. 38 (quoting *Yeager*, 557 U.S. at 124-25). But that is enough to resolve this case: the only valid verdicts here are acquittals. And if valid acquittals cannot impugn valid convictions, invalid convictions cannot impugn valid acquittals. The government faults petitioners for relying on "*Powell*'s holding" (*id.*), but holdings matter; *Powell*'s holding dictated *Yeager*. Nor do petitioners ignore "the rationale underlying" *Powell*. *Id.* *Powell*'s rationale is that valid verdicts deserve "respect" and must be given "full effect." *Yeager*, 557 U.S. at 124. But the government urges respect for invalid verdicts at the expense of valid verdicts.

Because *Powell* reasoned that collateral estoppel principles "are no longer useful" when "the same jury reached inconsistent results," 469 U.S. at 68, the government argues that "[n]othing about *Powell*'s rationale changes when the inconsistent conviction is vacated for legal error," Br. 37. But again, the jury "reached inconsistent results" in *Yeager*. And again the government equates valid and invalid convictions even though the law respects one but abhors the other. Only *valid* verdicts "bring[] to the criminal process, in addition to the collective judgment of the community, an element of needed finality." *Powell*,

469 U.S. at 67. Vacated convictions are non-final and do not reflect a collective judgment that the defendant committed any crime.

Powell's analysis of the equities also no longer applies with vacated convictions. *Id.* at 64-67. When a defendant suffers through a tainted trial, is tarred by an invalid conviction, and possibly served prison time, we know exactly whose "ox has been gored" (the defendant's) and who enjoyed a "windfall" (the government). *Id.* at 65. Further, *Powell*'s observation that jury inconsistency "often" is "a product of jury lenity," *id.* (quoted at U.S. Br. 21), collapses with vacated convictions. Even had the jury believed that petitioners were "guilty of [all] counts" (U.S. Br. 21) and acquitted on some out of lenity, all the jury would necessarily have concluded is that petitioners were guilty of a lawful gratuity.

The government repeatedly asserts that vacatur does not erase the "historical fact" of a conviction. Br. 17, 34, 37, 47. But if it is only the "historical fact" on which the government relies, why did the First Circuit devote 20 pages to exploring what the unlawful convictions "necessarily decided"? Pet. Br. 42. The government does not say. Further, nothing erased the "historical fact" of the hung counts or their apparent inconsistency with the acquittals in *Yeager*, but this Court disregarded them nonetheless.

The government argues that courts consider inconsistent "convictions" to determine whether a jury "resolve[d] a particular issue in the defendant's favor when acquitting on a related count." Br. 19. But the government's cases involve neither vacated convictions nor inconsistency. *Schiro v. Farley* did not even involve an acquittal, but a jury's "failure to return a

verdict" on a particular count. 510 U.S. 222, 234, 236 (1994). The lower court cases involved valid convictions that courts "harmonize[d]" with acquittals. *Flittie v. Solem*, 775 F.2d 933, 941 (8th Cir. 1985); *see United States v. Neal*, 822 F.2d 1502, 1508 (10th Cir. 1987) (similar).

Because petitioners' convictions were vacated, no inconsistent *valid* verdicts exist. The government rather wants to retry petitioners to obtain valid convictions that would be inconsistent with petitioners' acquittals. Pet. Br. 37. *Powell*'s refusal to disturb inconsistent valid verdicts does not allow the government to try to create them.

2. *Powell* did not involve a re-prosecution, but rather valid verdicts rendered by the same jury at a single trial. The government argued in *Powell* that collateral estoppel is "simply inapposite to jury verdicts on multiple counts at a single trial." U.S. *Powell* Brief 28 n.36. The Court agreed, holding that double jeopardy did not apply at all. 469 U.S. at 65; Pet. Br. 31-32, 36. Having won *Powell* by arguing that single trials are different than re-prosecutions, the government now turns around and argues that *Powell* governs re-prosecutions. Br. 38.

As support for this extension of *Powell*, the government cites *Standefer v. United States*, 447 U.S. 10 (1980). Br. 21, 38. But *Standefer*, like *Powell*, involved neither double jeopardy, vacated convictions, nor re-prosecution. *Standefer*, rather, concerned whether *nonmutual* estoppel applies when the jury at a *separate* defendant's earlier trial returned inconsistent *valid* verdicts. 447 U.S. at 11-13. And while *Standefer* stated in a footnote that the inconsistency "is reason, in itself, for not giving preclusive effect to the acquittals," *id.* at 23 n.17, it said nothing

about invalid verdicts. The government unsuccessfully relied on the same footnote in *Yeager*. U.S. *Yeager* Brief 32-35.

The government argues that *Powell* "contemplated that the acquittals in that case would not ... foreclose retrial on the counts of conviction if the convictions were set aside." Br. 38. But because the Court refused to set aside the convictions, it had no need to—and did not—address whether double jeopardy would preclude a retrial had the decision gone the other way. In the portion of *Powell* the government cites, the Court passingly referred to a "new trial" only in explaining that double jeopardy did not apply at all. 469 U.S. at 65.

3. The government chastises petitioners for invoking "respect" for the jury's acquittals while "ignor[ing] the jury's unanimous decision that they were guilty of violating Section 666." Br. 40. But the government acknowledges that the "jury did not necessarily find [petitioners] guilty of an exchange theory of bribery"—*i.e.*, no "unanimous decision" found petitioners "guilty of violating Section 666." *Id.* There is nothing anomalous in concluding that petitioners' "final and unassailable" acquittals are entitled to respect, U.S. Br. 39, while the non-final, wholly-assailed convictions are not. But there *is* something anomalous about denying double jeopardy protection to valid acquittals, which must be given "full effect," *Yeager*, 557 U.S. at 124, based solely on vacated convictions, which lack "any ... effect," *Butler v. Eaton*, 141 U.S. 240, 244 (1891).

The government argues that "all 12 jurors may well have found that petitioners committed bribery in violation of Section 666 under a valid theory." Br. 40. But the First Circuit held that the instructional

error was prejudicial. Pet. App. 104a-105a. The government is similarly wrong that "collateral estoppel is inapplicable when a court lacks confidence in the correctness of an original adjudication." Br. 23. Again, the same could have been said in *Yeager*, and courts might "lack confidence in the correctness" of an acquittal for countless reasons—like if the jury announced that it flipped a coin, or acquitted in the face of incontrovertible DNA evidence of guilt. Pet. Br. 37-38; NAPD Br. 10, 19-20. The government does not dispute that its theory would strip such acquittals of preclusive effect. But this Court rejected that path long ago—acquittals are acquittals. Pet. Br. 34-37.*

4. The government notes that, in the civil context, "non-mutual collateral estoppel does not apply when the judgment that would be given preclusive effect is inconsistent with another prior judgment." Br. 22 (citing Restatement (Second) of Judgments § 29 cmt. f). That may be true with respect to an inconsistent prior *valid* judgment, but the government cites no authority that an inconsistent *invalid* judgment strips a valid judgment of civil non-mutual collateral estoppel effect. Regardless, the estoppel here

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* Bravo-Fernandez's vacated conviction for traveling to violate repealed Puerto Rico statutes offers no support for the government's speculation. U.S. Br. 40-41 n.9. And Martínez-Maldonado was acquitted of this charge. J.A. 88. The government also misrepresents that the "evidence at trial established that Bravo-Fernandez had been giving cash bribes to de Castro Font." Br. 4 n.2. Every time de Castro Font's name appeared on the verdict form, the jury checked "no" for not guilty. J.A. 86-88. Contrary to the government's insinuation (Br. 4-5 n.2), de Castro Font's 2009 conviction had nothing to do with Bravo-Fernandez.

is *mutual*, and non-mutual estoppel imposes stricter requirements than estoppel between the same parties. Restatement (Second) of Judgments § 29 cmt. b. The Restatement identifies no inconsistency exception for *mutual* estoppel. *Compare id.* § 28 *with id.* § 29(4).

The government asserts that civil mutual collateral estoppel may not apply if a verdict "was the result of compromise," *id.* § 28 cmt. j (quoted at Br. 22), but this exception applies only where "the party sought to be bound did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the first proceeding." *Id.* The government had every opportunity and incentive to prosecute the charges at the 2011 trial; petitioners were the ones denied a "full and fair adjudication" because of improper instructions.

Regardless, collateral estoppel cannot be any less protective of criminal defendants than it is of civil litigants, Pet. Br. 40; rather it is *more* protective. For instance, the absence of appellate review forecloses estoppel in the civil context, but not the double jeopardy context. U.S. Br. 28. Contrary to the government's suggestion (*id.*), the fact that the government cannot appeal acquittals does not support denying preclusive effect here. It rather highlights the skepticism that should accompany the government's effort to undermine acquittals by questioning their rationality.

III. Vacated Convictions Are Legal Nullities

1. This Court repeatedly has announced that vacated convictions are legal nullities, and cannot impose "disabilities or burdens" on criminal defendants. *Fiswick*, 329 U.S. at 222; *see* Pet. Br. 39-41 (collect-

ing cases). The government fails to identify any decision of this Court giving legal effect to a vacated conviction to a defendant's detriment.

Morris v. Mathews, 475 U.S. 237 (1986), does not aid the government (U.S. Br. 41). The defendant was convicted of aggravated murder in connection with a robbery, and the "aggravated" aspect violated double jeopardy based on a prior robbery conviction. 475 U.S. at 242. As a remedy, the state appellate court reduced the aggravated-murder conviction to the lesser included offense of murder, which was not jeopardy-barred. *Id.* at 243. This Court held that this remedy was adequate unless "the inclusion of the jeopardy-barred charge"—*i.e.*, the "aggravated" aspect—likely influenced the outcome on the lesser included, non-jeopardy-barred offense. *Id.* at 247. The Court thus effectively severed the invalid aspect of the conviction and treated the case as if the state tried the defendant for two separate offenses—aggravated murder and simple murder. The case was "no differen[t]" than *Benton v. Maryland*, 395 U.S. 784 (1969), where the defendant was convicted of both burglary and a jeopardy-barred larceny charge. *Morris*, 475 U.S. at 246.

In noting that the jury had "necessarily found" the defendant committed murder, the Court relied on the *valid* conviction for murder. *Id.* at 247. Far from relying on the vacated conviction, the Court ensured that it was irrelevant. If the presence of the vacated charge and conviction *had* influenced the jury in convicting on simple murder—in other words, if it was prejudicial—that conviction too had to be vacated. *Id.* Here, the vacated convictions would indisputably be prejudicial—reliance on invalid convictions, which

have no lesser included offense, is the only thing the government says permits retrial.

The government concedes in its corrected brief and accompanying letter that *Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co.*, 120 U.S. 141 (1887), was not a criminal case and did not involve a vacated conviction. Br. 44-45. The word "conviction" appears only once, describing a state court's holding that, "i[f] there be a conviction before a magistrate having jurisdiction of the subject-matter, *not obtained by undue means*, it will be conclusive evidence of probable cause." *Id.* at 151 (emphasis added) (quoting *Payson v. Caswell*, 22 Me. 212, 226 (1842)). The italicized language supports petitioners' position. *Crescent City* then held that legitimate *judicial* disagreement about entitlement to a civil injunction forecloses a litigant from obtaining damages for malicious prosecution of a civil claim. 120 U.S. at 157-60.

2. It is especially egregious to rely on vacated convictions to question petitioners' innocence; vacaturs restore the presumption of innocence. *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988); Pet. Br. 43. The government denies that it presupposes that "vacated convictions embody a factual finding of guilt," insisting that they are relevant only "to establish the jury's inconsistency." Br. 46, 47 n.11. But make no mistake: a purported "factual finding of guilt" is the government's *exclusive* explanation for why inconsistent vacated convictions deserve consideration while inconsistent hung counts do not. Again, purporting to distinguish *Yeager*, the government asserts: "[T]he entire jury was convinced that the Government had proven each of the elements of the crime beyond a reasonable doubt." Br. 28. And here:

"[Vacated] [c]onvictions *are* evidence of something because they ... signal the unanimous vote of all 12 jurors to find guilt beyond a reasonable doubt." Br. 30. Once more: The jury's vacated "decision to convict represents the unanimous judgment of jurors on the merits of the charge." Br. 28. Yet again: "[T]he jury believed the defendant was guilty of both counts." Br. 21.

Nor can the government ignore vacated convictions' conceded lack of "collateral estoppel effect" on the theory that the government is not using the convictions affirmatively to "estop petitioners." Br. 47 n.11. For collateral estoppel purposes, vacated judgments are, "to our judicial knowledge, without any validity, force, or effect." *Butler*, 141 U.S. at 244. Using vacated convictions to establish guilt and using them to establish lack of innocence is a distinction without a difference. In both situations the vacated conviction operates against the defendant to devastating "effect."

Adhering to the rule that vacated convictions are nullities does not contravene *Ashe*'s rule of "realism and rationality" (U.S. Br. 47-48) any more than ignoring hung counts did in *Yeager*. Only some proceedings are "relevant matter" under *Ashe*, 397 U.S. at 444; unreliable convictions do not qualify.

3. Lower courts agree in myriad contexts that vacated convictions cannot be used against defendants. Pet. Br. 38-41. The vast majority of the government's cases are inapposite. U.S. Br. 42-47 In *United States v. Velasquez*, a vacated conviction worked to the defendant's *benefit*: the court "relied" on it in the sense that the same absence of facts that required reversal of one co-defendant's conspiracy conviction required reversal of the other co-

defendant's conspiracy conviction. 885 F.2d 1076, 1090-91 (3d Cir. 1989). In *Brennan v. United States*, the court upheld a RICO conviction because the defendant had been separately and validly convicted of Travel Act counts that qualified as RICO predicates, regardless of vacated wire-fraud predicates. 867 F.2d 111, 115 (2d Cir. 1989).

Other courts admitted evidence of criminal acts, not the vacated conviction itself, in a subsequent prosecution under Federal Rule of Evidence 404(b). *United States v. Sneezer*, 983 F.2d 920, 924 (9th Cir. 1992); *Russell v. Lynaugh*, 892 F.2d 1205, 1212 (5th Cir. 1989). This Court has likewise distinguished between reliance on "conduct which gave rise to the [] charge" and reliance on an "invalid conviction." *Johnson*, 486 U.S. at 585-86. Or courts admitted the vacated conviction to show motive for other acts, not because the vacated conviction itself had legal effect. *United States v. Blanton*, 793 F.2d 1553, 1564-65 (11th Cir. 1986); *Newport News Shipbuilding & Dry Dock Co. v. NLRB*, 738 F.2d 1404, 1407 n.4 (4th Cir. 1984).

Nor do lower courts agree (U.S. Br. 42-47) that vacated convictions reflect probable-cause determinations that preclude malicious-prosecution suits. Courts are "divided" on the question. *Mosley v. Wilson*, 102 F.3d 85, 91 (3d Cir. 1996) (Br. 45). *Harris v. Bornhorst*, 513 F.3d 503, 521-22 (6th Cir. 2008) (Br. 45), *permitted* a malicious-prosecution suit to proceed notwithstanding a vacated conviction. Regardless, cases concerning tort recovery hardly suggest that vacated convictions can deprive defendants of double jeopardy protection. Indeed, courts have held that hung counts "confirm[] that there surely was probable cause" that bars a malicious-prosecution

suit. *Singleton v. City of New York*, 632 F.2d 185, 193-94 (2d Cir. 1980). But hung counts are still irrelevant for double jeopardy under *Yeager*.

Against the mountain of cases treating vacated convictions as legal nullities in countless contexts, the government found two lower court decisions that relied on vacated convictions. U.S. Br. 42-43, 46. One used a vacated conviction to support probable cause for a wiretap, *United States v. Wagner*, 989 F.2d 69, 73-74 (2d Cir. 1993); the other used vacated convictions in affirming separate convictions on plain error review, *United States v. Christensen*, 2015 WL 11120665, at *15-17 (9th Cir. Aug. 25, 2015). Those decisions are wrong. And that they are the best the government could find in the history of legal jurisprudence says it all.

IV. The Decision Below Invites Prosecutorial Abuse

1. Prosecutors routinely overcharge cases, exploiting the "extraordinary proliferation of overlapping and related statutory offenses" in the modern criminal code. *Ashe*, 397 U.S. at 445 n.10. This case is no exception. The government charged petitioners with duplicative offenses, predictably resulting in inconsistent verdicts. *Ashe* is designed to prevent such abuse, but the government's position would condone and even encourage it.

The government contends that prosecutors do not overcharge cases specifically "in hopes of obtaining inconsistent verdicts so that they can avoid application of collateral estoppel in a subsequent prosecution." Br. 49. That is a strawman. Prosecutors already have plenty of incentives to bring duplicative charges. Pet. Br. 45-47. Of course they do not set out hoping to obtain inconsistent verdicts. But two

chances to convict—or 200—are better than one. *Ashe's* collateral estoppel rule *deters* overcharging by imposing consequences on prosecutors who engage in this abuse or who stretch criminal statutes beyond their proper reach. The decision below would remove this deterrent. NACDL Br. 12-14; Criminal Law Profs. Br. 18-19.

The government suggests that prosecutors have adequate incentives to bring compact indictments because overcharging risks "confusing jurors" and "increasing the likelihood" of "acquit[tals] out of lenity." Br. 49. But multiple charges increase the likelihood of *convictions*—not acquittals. Pet. Br. 46-47. And confusing the jury with duplicative charges tends to benefit the government—jurors may wrongly believe that defendants must be guilty of something. *Id.* Additional charges also increase prosecutors' leverage in plea negotiations. *Id.* at 46.

The government further suggests that prosecutors would not overcharge cases in hopes of obtaining a retrial because the passage of time disadvantages the prosecution. Br. 49-50. The government unsuccessfully pressed this argument in *Yeager*. U.S. *Yeager* Brief 39. And again, the point is not that prosecutors "try to obtain an inconsistent verdict," Br. 50, but that the availability of retrial after inconsistent verdicts removes the disincentive to overcharge. Meanwhile, the government fails to confront the perverse incentives that would result from the interplay of *Yeager* and the government's position here. Pet. Br. 50-51.

Quibbling with the cases petitioners cited as examples of "overcharging" does not change the fact that overcharging is undeniably rampant. U.S. Br. 50 n.13. Commentators and members of this Court

have lamented the problem. Pet. Br. 45-46. In any event, the fact that multiple charges comply with *Blockburger*—which is all the government establishes, Br. 50 n.13—hardly justifies piling charge on top of duplicative charge. *Ashe* adopted a collateral estoppel rule because *Blockburger* did not prevent the prosecution there—*Blockburger* alone does not secure individuals against the abuses *Ashe* prevents.

Ashe's discussion of the policies supporting collateral estoppel is no less relevant because the government did not bring charges "sequentially." U.S. Br. 51. Again, the government unsuccessfully pressed this argument in *Yeager*. U.S. *Yeager* Brief 25-26. Piling on duplicative charges in a single indictment is no less abusive than the prosecution in *Ashe*. And at a second trial, the government could "hone[] its trial strategy to shore up its case," making petitioners' 2011 trial a "'dry run.'" U.S. Br. 51 (quoting *Ashe*, 397 U.S. at 447).

The government claims that no "overcharging" occurred here, noting that it is neither "unusual" nor "pernicious" to charge defendants with "both conspiracy and the substantive offense." Br. 51 n.14. The laundry list of duplicative charges in this case speaks for itself: the government charged petitioners with bribery, conspiracy to commit bribery, traveling to commit bribery, conspiracy to travel to commit bribery, and traveling to violate repealed statutes. The fact that the government sees this as business as usual only illustrates the problem.

2. The "weighty interests in permitting retrial" of vacated counts as a general rule (U.S. Br. 52-53) do not justify discarding acquittals and allowing the government a second bite at the apple. The Court re-

jected this argument when the government made it about hung counts in *Yeager*. 557 U.S. at 123-24.

The government's warning that this case threatens "the sound administration of justice" rings as hollow as it did in *Yeager*. Br. 52; *see* U.S. *Yeager* Brief 23-27. If collateral estoppel applies here, the government still will usually be able to retry after convictions are vacated. Collateral estoppel will bar retrial only where the jury returns inconsistent verdicts. That situation is the exception, not the rule. And it would happen even less frequently if prosecutors stopped overcharging cases and limited themselves to compact indictments.

CONCLUSION

The First Circuit's judgment should be reversed.

Respectfully submitted,

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Supreme Court of the United States

JUAN BRAVO-FERNANDEZ AND
HECTOR MARTINEZ-MALDONADO,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court Of Appeals for the First Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, under *Ashe v. Swenson* and *Yeager v. United States*, a vacated, unconstitutional conviction can cancel out the preclusive effect of an acquittal under the collateral estoppel prong of the Double Jeopardy Clause.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
INTEREST OF *AMICUS CURIAE* 1
INTRODUCTION AND SUMMARY OF ARGUMENT 1
ARGUMENT 4
I. THE GOVERNMENT'S POSITION IS INCONSISTENT WITH THE COMMON LAW ORIGINS AND HISTORICAL DEVELOPMENT OF OUR NATION'S DOUBLE JEOPARDY JURISPRUDENCE. 4
II. THE GOVERNMENT'S POSITION IS INCONSISTENT WITH THE NULLIFYING EFFECT OF VACATUR IN NUMEROUS CONTEXTS, INCLUDING DOUBLE JEOPARDY. 9
III. THE GOVERNMENT'S POSITION ENCOURAGES PROSECUTORIAL OVER-REACH, UNDERMINES THE SACRED LIBERTY INTERESTS PROTECTED BY THE DOUBLE JEOPARDY CLAUSE, AND IMPUGNS THE INVIOLATE NATURE OF JURY ACQUITTALS. 17
CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

Alim v. Gonzales,
446 F.3d 1239 (11th Cir. 2006) 13

Asgeirsson v. Abbott,
696 F.3d 454 (5th Cir. 2012) 11

Ashe v. Swenson,
397 U.S. 436 (1970) 2, 21

Bagley v. CMC Real Estate Corp.,
923 F.2d 758 (9th Cir. 1991) 10

Brown v. Ohio,
432 U.S. 161 (1977) 18

Bullington v. Missouri,
451 U.S. 430 (1981) 10, 15

Burks v. United States,
437 U.S. 1 (1978) 22

Coleman v. Tennessee,
97 U.S. 509 (1878) 9

Crist v. Bretz,
437 U.S. 28 (1978) 9, 18

Cruz-Garza v. Ashcroft,
396 F.3d 1125 (10th Cir. 2005) 13

Discipio v. Ashcroft,
369 F.3d 472 (5th Cir. 2004) 14

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764 F.2d 442 (6th Cir. 1985) 10

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187 U.S. 71 (1902) 8

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284 U.S. 390 (1932) 17

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950 F.2d 1419 (9th Cir. 1991) 11

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35 F.3d 1466 (10th Cir. 1994) 10

Gibson v. Commonwealth,
4 Va. (2 Va. Cas.) 111 (Gen. Ct. 1817) 6

Gore v. United States,
357 U.S. 386 (1958) 5

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355 U.S. 184 (1957) ..... *passim*

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541 F.3d 671 (6th Cir. 2008) 10

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85 U.S. (18 Wall.) 163 (1873) 4, 19

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2 Ill. (1 Scam.) 414 (1837) 6

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153 U.S. 684 (1894) 7

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467 F.3d 1185 (9th Cir. 2006) 13

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767 F.2d 21 (1st Cir. 1985) 11

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18 Johns. 187 (N.Y Sup. Ct. 1820) 8

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667 F.3d 448 (4th Cir. 2012) 14

In re Pickering,
23 I. & N. Dec. 621 (BIA 2003) 14

Pickering v. Gonzales,
465 F.3d 263 (6th Cir. 2006) 13

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432 F.3d 193 (3d Cir. 2005) 14

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322 F.3d 804 (5th Cir. 2002) 14

Richardson v. United States,
468 U.S. 317 (1984) 9

Rumierz v. Gonzales,
456 F.3d 31 (1st Cir. 2006) 14

Russman v. Bd. of Educ.,
260 F.3d 114 (2d Cir. 2001) 11

Saleh v. Gonzales,
495 F.3d 17 (2d Cir. 2007) 13, 14

Sandoval v. INS,
240 F.3d 577 (7th Cir. 2001) 13

Sparf v. United States,
156 U.S. 51 (1895) 7

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5 F.2d 65 (2d Cir. 1925) 10

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17 Iowa 329 (1864) 6, 15

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472 F.2d 1178 (8th Cir. 1973) 12

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155 U.S. 271 (1894) 8

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721 F.3d 678 (D.C. Cir. 2013) 10

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76 U.S. 608 (1869) 11

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110 F.3d 746 (10th Cir. 1997) 12, 13

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245 F.3d 126 (2d Cir. 2001) 12

United States v. Crowell,
374 F.3d 790 (9th Cir. 2004) 15, 16

United States v. DiFrancesco,
449 U.S. 117 (1980) 19

United States v. Dixon,
509 U.S. 688 (1993) 21

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718 F.3d 1282 (10th Cir. 2013) 16

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405 F.3d 960 (11th Cir. 2005) 13

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22 U.S. (9 Wheat.) 579 (1824) 8

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377 U.S. 463 (1964) 15

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636 F.2d 1138 (6th Cir. 1980) 12

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101 F.3d 845 (2d Cir. 1996) 11

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U.S. Const. amend. V. 1, 8

Statutes and Guidelines

8 U.S.C. § 1101(a)(48) 13

18 U.S.C. § 666 2

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§ 2L1.2 13

U.S. Sentencing Guidelines Manual
§ 2X1.1(b)(2) 22

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies helps restore the principles of limited constitutional government that are the foundation of liberty. Toward that end, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and submits *amicus* briefs to this Court and other courts across the Nation. Cato regularly advocates for a robust interpretation of the Fifth Amendment's Double Jeopardy Clause, as envisioned by the Framers in the Constitution, as an important check on prosecutorial excesses and a vital bulwark for liberty. It has submitted *amicus* briefs to this Court in a number of relevant cases, including *Hatch v. United States*, No. 13-6765, and *Cannon v. United States*, No. 14-5356.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution guarantees that no person shall be "twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. V. This "great constitutional protection[]" is a "vital safeguard in our society." *Green v. United States*, 355 U.S. 184, 198 (1957).

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amicus curiae* and its counsel contributed monetarily to its preparation or submission. The parties have consented to the filing of this brief and copies of their letters of consent have been lodged with the Clerk of the Court.

"[E]mbodied" in this right is the principle that "when an issue of ultimate fact has once been determined by a valid and final judgment" of acquittal, it "cannot again be litigated" in a second trial for a separate offense. *Ashe v. Swenson*, 397 U.S. 436, 443, 445 (1970). In *Yeager v. United States*, the Court applied *Ashe* to a case where the jury rendered a mixed verdict—"an acquittal on some counts and a mistrial declared on others"—and held that the "apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts" does not "affect[] the preclusive force of the acquittals under the Double Jeopardy Clause." 557 U.S. 110, 112, 120 (2009).

Petitioners here, like more and more criminal defendants in recent years, were charged by federal prosecutors with multiple, overlapping offenses, including an expansive and textually unsupported interpretation of a criminal statute—in this case, a "gratuity" theory of federal program bribery under a statute (18 U.S.C. § 666) that criminalizes only *quid pro quo* bribery. *See* Pet. App. 59a. As relevant here, the jury returned a mixed verdict: acquittal on two of the charges—conspiring and traveling to violate § 666—and guilt on the predicate § 666 violation. Pet. App. 64a.

The acquittals necessarily depended on a finding that neither defendant violated § 666. Pet. App. 12a–15a & n.5. The guilty verdict, however, was the product of instructions allowing conviction for conduct that is not a crime. *See* Pet. App. 104a–105a. The government seeks to retry Petitioners on that reversed count—this time with the jury instructed on an actual crime—even though "the Double Jeopardy Clause precludes the [g]overnment from relitigating

any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager*, 557 U.S. at 119. Ignoring entirely the relevance and legal effect of the subsequent vacatur, the government argues that the acquittals are stripped of their collateral estoppel effect because the jury "was not acting rationally when it rendered an inconsistent verdict." Br. for the U.S. in Opp. 16.

The government's "narrow, grudging application" of the Double Jeopardy Clause would "deprive[it] of much of [its] significance" and should be rejected. *Green*, 355 U.S. at 198. The government's position is inconsistent with the historical development of double jeopardy jurisprudence in the United States—in particular, the parallel treatment of hung counts and vacated convictions for double jeopardy purposes. *See infra* Pt. I. It is also impossible to square with the long-settled status of vacated convictions as legal nullities in this and numerous other contexts. *See infra* Pt. II. In fact, the government itself benefits from treating vacated convictions as if they never existed for double jeopardy purposes when it retries a defendant who has successfully appealed a conviction. If such convictions were not legal nullities, the Double Jeopardy Clause would preclude retrial. *See id.*

Finally, if the government's position becomes the law of the land, it will encourage even greater prosecutorial overreach. The more offenses the government can charge for the same underlying conduct, the greater the chance of split verdicts where even a later-reversed conviction would have the consequence of nullifying the estoppel effect of acquittals. The government needs fewer, not greater, incentives for piling on theories of criminal liability that push beyond the law's limits. Nor should the government

be allowed to use trials as dress rehearsals for future successive prosecutions, thereby undermining the salutary—indeed, "sacred," *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 178 (1873)—liberty interests protected by the Double Jeopardy Clause, and improperly chipping away at the "validity" and "legitimacy" of jury verdicts which, this Court has emphasized, must not be "impugn[ed]," even when "logically inconsistent." *Yeager*, 557 U.S. at 125. *See infra* Pt. III.

ARGUMENT

I. THE GOVERNMENT'S POSITION IS INCONSISTENT WITH THE COMMON LAW ORIGINS AND HISTORICAL DEVELOPMENT OF OUR NATION'S DOUBLE JEOPARDY JURISPRUDENCE.

1. Prosecutors benefit greatly from the manner in which double jeopardy jurisprudence has developed to allow them—after a jury hangs or a conviction has been vacated—to put a defendant on trial a second time for the same offense. The rationales permitting this result in the two contexts have developed in parallel from their common law roots to the modern era, diverging in their particulars but anchored fundamentally in the notion that neither a hung jury nor an overturned conviction is a legally operative event. But now, the government asks this Court to treat vacated convictions *differently* from hung counts when assessing their impact on the preclusive effect of an acquittal. The Court should reject this invitation to introduce such doctrinal inconsistency at odds with the common law origins and historical development of Fifth Amendment jurisprudence.

2. Double jeopardy "is rooted in history and is not an evolving concept like that of due process . . . ."

Gore v. United States, 357 U.S. 386, 392 (1958). The general principle has been "nearly universal" in legal systems throughout history and was recognized at common law by the thirteenth century. Donald Burton, Note, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 Ohio St. L.J. 799, 800 (1988). "By the early 15th century it was settled by statute that an acquittal after a jury trial on charges initiated by appeal [*i.e.*, at the behest of a private party rather than the crown] was a bar to prosecution for the same offense by subsequent indictment." U.S. Department of Justice, Office of Legal Policy, *Report to the Attorney General on Double Jeopardy and Government Appeals of Acquittals* 8, *reprinted in* 22 U. Mich. J. L. Reform 831 (1989).

At common law, double jeopardy took the form of four different "pleas in bar": *auterfoits acquit* (former acquittal), *auterfoits convict* (former conviction), *auterfoits attaint* (former attainder), and pardon. Charles Cantrell, *Double Jeopardy and Multiple Punishment: An Historical and Constitutional Analysis*, 24 S. Tex. L.J. 735, 754 (1983). A criminal defendant "could use one of these pleas to bar prosecution on the grounds that the state had already acquitted, convicted, attainted, or pardoned him for the offense of which he was accused." Burton, *supra*, at 801.

With respect to prior convictions, a defendant was entitled to double jeopardy protection only if the conviction remained intact at the time of the plea. If, however, the "judgment, pronounced upon conviction, [wa]s falsified or reversed, all former proceedings [we]re absolutely set aside, and the party st[ood] as if he had never been at all accused," for better and for worse: He was "restored in his credit, his capaci-

ty, his blood, and his estates," but he was also "liable to another prosecution for the same offence." 4 William Blackstone, *Commentaries* *393.

3. These principles guided early American courts as they confronted double jeopardy challenges throughout the nineteenth century. *See* Monroe G. McKay, *Double Jeopardy: Are the Pieces the Puzzle?*, 23 Washburn L.J. 1, 9 (1983) (discussing the Double Jeopardy Clause's roots in the common law pleas). For example, it was widely accepted that double jeopardy does not attach to convictions that have been reversed or set aside. *See, e.g.*, *Gibson v. Commonwealth*, 4 Va. (2 Va. Cas.) 111, 111 (Gen. Ct. 1817) ("A discharge of a jury, after they have rendered a verdict against a prisoner, but which verdict is adjudged to be a nullity because it was not duly perfected, and therefore set aside as insufficient, is no bar to a prosecution under the same, or a new Indictment.").[2] This Court later adopted the same rule: "Although Mr. Justice Story . . . thought that a new trial could not be granted to a man convicted of murder by a jury, because to do so would be to put him

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[2] *See also, e.g.*, *State v. Redman*, 17 Iowa 329, 335 (1864) ("[W]here the verdict, especially if intended to be a verdict of guilty, is so defective and uncertain that the court does not know for what offense to pass judgment, it may be set aside by the court, even against the defendant's objection, and the proceeding is no bar to another trial." (emphasis removed)); *Lawrence v. People*, 2 Ill. (1 Scam.) 414, 415 (1837) ("The only question presented in this case, is, on the power of the Circuit Court to set aside a defective verdict, on which no judgment could be rendered, and to award a *venire de novo*. The right to exercise this power can not be questioned. It has been exercised and practiced on in numerous criminal cases, and is undoubted.").

twice in jeopardy of his life, yet the circuit courts of the United States may doubtless grant new trials after conviction, though not after acquittal, in criminal cases tried before them." *Sparf v. United States*, 156 U.S. 51, 175 (1895).[3] In reaching this conclusion, this Court came to the view that the defendant's decision to appeal the conviction carried with it an implied consent to retrial, notwithstanding whatever double jeopardy protection might otherwise have flowed from the jury's verdict. *See Murphy v. Massachusetts*, 177 U.S. 155, 160 (1900) ("[I]f the sentence had been complied with he could not have been punished again for the same offense. But as the original sentence was set aside at his own instance, he could not allege that he had been in legal jeopardy by reason thereof." (citation omitted)).

4. A second question confronting 19th-century American courts was whether judges could discharge the original jury and order the defendant retried following a mistrial. Again, the courts looked to the common law for guidance, with this Court answering

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[3] A contrary view of double jeopardy might have had an adverse impact on the rights of early American criminal defendants by pushing states to forbid or severely limit the mechanisms available to challenge jury verdicts. The right to appeal criminal convictions did not exist at common law, *see, e.g.*, Jeremiah E. Goulka, *The First Constitutional Right to Criminal Appeal: Louisiana's Constitution of 1845 and the Clash of the Common Law and Natural Law Traditions*, 17 Tul. Eur. & Civ. L.F. 151, 167 (2002); David Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. Crim. L. & Criminology 518, 525–26 (1990), and this Court took as self-evident that "[a]n appeal from a judgment of conviction is not a matter of absolute right" and is "wholly within the discretion of the state to allow or not to allow." *McKane v. Durston*, 153 U.S. 684, 687 (1894).

the question in the affirmative: "The prisoner has not been convicted or acquitted, and may again be put upon his defence . . . whenever, in the [trial court's] opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 579–80 (1824); *see also, e.g.*, *People v. Goodwin*, 18 Johns. 187, 187–88 (N.Y. Sup. Ct. 1820).

The Court has since repeatedly applied *Perez* in rejecting double jeopardy claims following mistrials, *see, e.g.*, *Lovato v. New Mexico*, 242 U.S. 199, 201–02 (1916); *Thompson v. United States*, 155 U.S. 271, 274 (1894), including where the mistrial resulted from a hung jury, *see, e.g.*, *Keerl v. Montana*, 213 U.S. 135, 137–38 (1909); *Dreyer v. Illinois*, 187 U.S. 71, 85–86 (1902); *see also* Burton, *supra*, at 815 ("[The Double Jeopardy Clause] bars a mistrial declared at the request of a prosecutor unless the prosecutor shows that the judge ended the first trial only out of 'manifest necessity.' The 'prototypical' example of manifest necessity to end a trial is a hung jury." (footnote omitted)).

5. The notion that the government can retry a defendant after the jury hangs or a conviction is vacated is now fully engrained in American criminal procedure, despite apparent tension with the literal terms of the Double Jeopardy Clause. The guarantee that no person shall twice be "put in *jeopardy*" of punishment for the same offense is not conditioned on the result of the first trial. U.S. Const. amend. V (emphasis added). Yet, following a mistrial or overturned conviction, defendants are often forced to stand trial a second time for the same offense. In the hung jury context, this Court has expressly acknowl-

edged that *Perez*'s holding may not have been intended to resolve the double jeopardy question for which it has long been cited. *See Crist v. Bretz*, 437 U.S. 28, 34 n.10 (1978). But the Court dismissed this potential misreading of *Perez* as being "of academic interest only," *id.*, and *Perez* remains the controlling authority in this area, *see Richardson v. United States*, 468 U.S. 317, 323–24 (1984) (noting that the Court has been "entirely unwilling to uproot this settled line of cases").

Prosecutors, of course, benefit greatly from this Fifth Amendment jurisprudence, for it allows them to put a defendant on trial more than one time for a single offense. While the rationales permitting this result in the two contexts have diverged over time, both can be traced—at least in part—to the principles governing the early common law pleas: whether the jury hangs or its guilty verdict is set aside, in neither case is there a legally operative acquittal or conviction. But now, the government asks this Court to treat vacated convictions *differently* from hung counts when assessing their impact on the preclusive effect of an acquittal. The common law origins of double jeopardy protection and the historical development of double jeopardy jurisprudence in the United States counsel against such an inconsistent result.

II. The Government's Position Is Inconsistent With The Nullifying Effect Of Vacatur In Numerous Contexts, Including Double Jeopardy.

1. "[A]s every lawyer of experience in criminal law knows," a vacated conviction is a legal "nullity," devoid of power, effect, or consequence. *Coleman v. Tennessee*, 97 U.S. 509, 530 (1878) (Clifford, J., dis-

senting); *see also North Carolina v. Pearce*, 395 U.S. 711, 720–21 (1969) (overturned conviction "wholly nullified"). Vacatur "wipe[s] clean" the slate, *Bullington v. Missouri*, 451 U.S. 430, 442 (1981) (internal quotation marks and citation omitted), and leaves the defendant "stand[ing] as if he had never been at all accused" of the crime, 4 Blackstone, *supra*, at *393; *see also, e.g.*, *United States v. Jerry*, 487 F.2d 600, 607 (3d Cir. 1973); *cf. In re St. Lawrence Condensed Milk Corp.*, 5 F.2d 65, 65 (2d Cir. 1925) (vacated civil judgment treated as "never [having] had an effective existence").

2. Vacated convictions are treated as null and void across a wide range of contexts. For example, vacated convictions do not constitute final judgments for purposes of collateral estoppel, because vacatur "leav[es] nothing to which [a court] may accord preclusive effect." *Dodrill v. Ludt*, 764 F.2d 442 (6th Cir. 1985); *see also Kosinski v. C.I.R.*, 541 F.3d 671, 676–77 (6th Cir. 2008) (where court vacated judgments in criminal case, "there was no valid final judgment to which [another court] could give preclusive effect"); *cf. Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 762 (9th Cir. 1991) (once the defendant's conviction was reversed "there could have been no collateral estoppel effect of any kind"). This is but one aspect of the broader rule that a "judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel." *Franklin Sav. Ass'n. v. Office of Thrift Supervision*, 35 F.3d 1466, 1469 (10th Cir. 1994) (internal quotation marks and citation omitted)); *accord, e.g.*, *United Bhd. of Carpenters & Joiners v. Operative Plasterers' & Cement Masons' Int'l Ass'n*, 721 F.3d 678, 691 (D.C. Cir. 2013) ("A judgment vacated either by the trial court or on ap-

peal has no estoppel effect in a subsequent proceeding."); *No E. W. Highway Comm., Inc. v. Chandler*, 767 F.2d 21, 24 (1st Cir. 1985). A vacated judgment cannot have preclusive effect because vacatur "eliminates [the original] judgment," *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950), rendering it "null and void" and leaving the parties "in the same situation as if no trial had ever taken place," *United States v. Ayres*, 76 U.S. 608, 610 (1869); *accord Weyant v. Okst*, 101 F.3d 845, 854 (2d Cir. 1996).

Similarly, vacatur "deprives [a] court's opinion of precedential effect." *O'Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975); *see also, e.g.*, *Asgeirsson v. Abbott*, 696 F.3d 454, 459 (5th Cir. 2012) ("[T]his court has consistently held that vacated opinions are not precedent . . ."); *Russman v. Bd. of Educ.*, 260 F.3d 114, 121 (2d Cir. 2001) (noting that vacating district court's judgment would "deny it . . . precedential consequence"). Because a vacated decision is treated as if it never existed, that decision necessarily "has no precedential authority whatsoever." *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991).

Vacated convictions also are treated as legal nullities in the sentencing context. *Cf. Johnson v. United States*, 544 U.S. 295, 303 (2005). For example, the Federal Sentencing Guidelines instruct that "[s]entences resulting from convictions that have been reversed or vacated because of errors of law . . . are not to be counted" when determining the appropriate sentence for a repeat offender. U.S. Sentencing Guidelines Manual § 4A1.2, cmt. n.6. (2015). Applying this guideline, courts hold that defendants are entitled to resentencing where a prior conviction on which a sentence was based is subsequently vacated on procedural or substantive grounds. *See, e.g.*,

United States v. Ortiz, 741 F.3d 288, 293 (1st Cir. 2014) ("[T]he inappropriateness of including a vacated conviction in the computation of a defendant's criminal history score is readily evident."); *United States v. Guthrie*, 931 F.2d 564, 572 (9th Cir. 1991) (stating that it would be "contrary to the Guidelines" and "odd . for a federal court to treat as valid a state conviction that no longer exists"); *accord United States v. Cox*, 245 F.3d 126, 130 (2d Cir. 2001).

Even before the Federal Sentencing Guidelines, courts remanded for resentencing where a sentence was based—even in part—on a constitutionally infirm conviction. *See United States v. Tucker*, 404 U.S. 443, 447–48 (1972); *see also, e.g.*, *Walker v. United States*, 636 F.2d 1138, 1138–39 (6th Cir. 1980) (remanding for resentencing where defendant's sentence was based on an unconstitutional prior conviction that was later vacated); *Taylor v. United States*, 472 F.2d 1178, 1180 (8th Cir. 1973) (remanding for resentencing where one of defendant's prior convictions was later found to be "constitutionally infirm"). For example, in *Tucker*, this Court remanded for reconsideration of a sentence that had been based, in part, on subsequently vacated convictions, which this Court characterized as "misinformation of a constitutional magnitude." 404 U.S. at 447. The Federal Sentencing Guidelines thus formalized the well-established rule that convictions vacated on constitutional ground are legal nullities.[4]

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[4] Generally, "only those convictions valid at the time of sentencing" will be considered when calculating a sentence. *See United States v. Cisneros-Cabrera*, 110 F.3d 746, 748 (10th Cir. 1997). Section 2L1.2 of the Guidelines, however, explicitly provides for a sentencing enhancement "[i]f the defendant previ-

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In the immigration context, almost every circuit to have considered the issue has held that a conviction vacated due to "procedural or substantive defect" does not constitute a "conviction" under 8 U.S.C. § 1101(a)(48), and therefore "cannot serve as the basis for removability." *Nath v. Gonzales*, 467 F.3d 1185, 1189 (9th Cir. 2006); *see also Pickering v. Gonzales*, 465 F.3d 263, 266 (6th Cir. 2006) (conviction "vacated because of procedural or substantive infirmities" does not "remain[] valid for immigration purposes"); *accord Alim v. Gonzales*, 446 F.3d 1239, 1251 (11th Cir. 2006); *Cruz-Garza v. Ashcroft*, 396 F.3d 1125, 1129 (10th Cir. 2005); *Sandoval v. INS*, 240 F.3d 577, 583 (7th Cir. 2001).

In fact, although Section 1101(a)(48) does not define the term "conviction"—and is arguably susceptible to a "spectrum of possible interpretations," *Saleh v. Gonzales*, 495 F.3d 17, 22 (2d Cir. 2007)—courts nevertheless consider convictions vacated on the basis of procedural or substantive defects to be outside the scope of the statute, *see, e.g.*, *id.* This reading of the statute is eminently reasonable, because, "[w]here a conviction is vacated 'based on a defect in

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ously was deported, or unlawfully remained in the United States, *after* [being convicted of certain enumerated offenses]." U.S. Sentencing Guidelines Manual § 2L1.2 (emphasis added). Accordingly, "the relevant time frame for determining whether [§ 2L1.2's] enhancement should apply is *specifically provided by statute*," which is the time of deportation, rather than sentencing. *Cisneros-Cabrera*, 110 F.3d at 748 (emphasis added); *see also United States v. Orduno-Mireles*, 405 F.3d 960, 962 (11th Cir. 2005). Section 2L1.2 thus represents a statutorily mandated exception to the general rule that vacated convictions will not be considered for sentencing purposes.

the underlying criminal proceedings,' *the conviction is 'no longer.'*" *Phan v. Holder*, 667 F.3d 448, 452 (4th Cir. 2012) (emphasis added) (quoting *In re Pickering*, 23 I. & N. Dec. 621, 624 (BIA 2003)); *see also Pinho v. Gonzales*, 432 F.3d 193, 199 (3d Cir. 2005) (same); *Rumierz v. Gonzales*, 456 F.3d 31, 35 (1st Cir. 2006) (same).[5]

3. The same holds true under the Double Jeopardy Clause. A vacated conviction is a legal "nullity": a "nonevent" to which double jeopardy does not attach. *See supra* pp. 9–10. Post-vacatur, it is as if the verdict never existed, and as if no trial on that count had ever taken place. *See id.* A vacated conviction cannot, accordingly, divest a jury's acquittal of its preclusive effect.

Not only does this rule comport with the treatment of vacated convictions in numerous contexts, *see supra* pp. 10–14, it is in accord with the historical

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[5] Courts distinguish between convictions vacated on procedural or substantive grounds and those vacated solely "in an effort to avoid adverse immigration consequences." *Saleh*, 495 F.3d at 21. Convictions vacated on constitutional grounds—like the convictions at issue here—are *not* considered "convictions" under 8 U.S.C. § 1101(a)(48). *See Saleh*, 495 F.3d at 21. If the Fifth Circuit's decision in *Renteria-Gonzales v. INS*, 322 F.3d 804, 813-14 (5th Cir. 2002) is read to suggest that any vacated conviction qualifies as a "conviction" under § 1101(a)(48), regardless of the basis for vacatur, it is a complete outlier. Indeed, it has been criticized and called into question by a number of courts, including the Fifth Circuit itself. *See, e.g.*, *Pinho*, 432 F.3d at 209 n.22; *Renteria-Gonzales*, 322 F.3d at 820–23 (Benavides, J., concurring); *see also Discipio v. Ashcroft*, 369 F.3d 472 (5th Cir. 2004), *vacated by Discipio v. Ashcroft*, 417 F.3d 448 (5th Cir. 2005) (vacating panel decision and denying petition for rehearing en banc as moot where government agreed to terminate removal proceedings).

treatment of hung juries and overturned convictions under the Double Jeopardy Clause, *see supra* pp. 4–9. Given the shared status of hung juries and later-overturned convictions as legal nonevents—for double jeopardy purposes and more broadly—it is appropriate that their effect on simultaneously rendered acquittals is the same: no effect at all.

4. The government's attempt to distinguish hung juries from vacated convictions lacks merit. As this Court has made clear, for double jeopardy purposes, there is "no sensible basis" for differentiating "with regard to retrial" between an invalid verdict and "a failure to get a jury verdict at all." *United States v. Tateo*, 377 U.S. 463, 467 (1964) ("A defendant is no less wronged by a jury finding of guilt after an unfair trial than by a failure to get a jury verdict at all."); *cf. Redman*, 17 Iowa at 333 (noting that, in both contexts, "the verdict is a nullity (or so defective that no judgment can be rendered upon it), [and] the defendant may again be put upon his trial"). Both are legal nullities that cannot negate the preclusive effect of simultaneously rendered acquittals. Indeed, it is precisely because a hung jury or vacated conviction is a legal nullity or nonevent that the government has the power to retry a defendant on the same charge. *See supra* pp. 6–9; *Bullington*, 451 U.S. at 442 ("[The] rule that there is no double jeopardy bar to retrying a defendant who has succeeded in overturning his conviction . . . rests on the premise that the original conviction has been nullified . . "); *Yeager*, 557 U.S. at 118 ("[T]he jury's inability to reach a verdict [i]s a nonevent that does not bar retrial.").[6]

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[6] The court below relied on *United States v. Crowell*, 374 F.3d 790, 792 (9th Cir. 2004), for the proposition that a court "does

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To distinguish hung juries, the government would assess the effect of the conviction at the moment the verdict is rendered, while ignoring all that follows. But if that were the accepted approach, the government would *always* be prohibited from retrying counts where the jury convicted and a court later vacated the conviction. The reason the government *is* allowed to retry on vacated counts is that vacatur of the conviction renders it a nullity. Call it Schrödinger's conviction, which both exists and does not exist until we observe the decision on appeal; if that decision vacates the conviction, we learn that it never existed at all.

Analogies to quantum physics aside, the issue here is not whether the jury may have acted illogically, inconsistently, or irrationally. The express "hold[ing]" of *Yeager* was that the "apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other

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not necessarily attempt to erase the fact of the conviction" when vacating a conviction. Pet. App. 16a (quoting *Crowell*, 374 F.3d at 792). From this the lower court erroneously leapt to the conclusion that a vacated conviction remains a relevant legal "event" under *Ashe* and *Yeager*. Not so. *Crowell*'s language must be read in context. *Crowell* was distinguishing expungement from vacatur. Expungement involves the physical destruction or sealing of records associated with a conviction without rendering the conviction itself a legal nullity. *See United States v. Dyke*, 718 F.3d 1282, 1292–93 (10th Cir. 2013). In contrast, as *Crowell* recognized, vacatur "nullifies the conviction and its attendant legal disabilities," 374 F.3d at 792; but vacatur does not necessarily involve physical destruction of the record of conviction. In other words, a vacated conviction may technically remain a matter of public record, but vacatur erases any shred of legal significance.

counts" does not "affect[] the preclusive force of the acquittals under the Double Jeopardy Clause." 557 U.S. at 112. And that holding was an *extension* of *Dunn v. United States*, 284 U.S. 390 (1932), which had held that "a logical inconsistency between a guilty verdict and a verdict of acquittal does not impugn the validity of either." *Yeager*, 557 U.S. at 112. An acquittal is not impugned by a legally nullified guilty verdict.

By arguing for a contrary rule, the government attempts to use vacated convictions as both a sword and a shield. On one hand, the government seeks to treat the vacated convictions as legal nullities: "non-events" that permit retrial on the exact same counts. *Cf. Yeager*, 557 U.S. at 123–24. On the other, it argues that the vacated convictions are significant legal "events" that deprive the accompanying acquittals of their preclusive effect. The government's position is logically untenable and, more importantly, flies in the face of history and precedent.

III. The Government's Position Encourages Prosecutorial Overreach, Undermines The Sacred Liberty Interests Protected By The Double Jeopardy Clause, And Impugns The Inviolate Nature Of Jury Acquittals.

Allowing the decision below to stand would give prosecutors even more incentive to overcharge the same underlying conduct with multiple counts, forgive the government for pursuing unlawful theories of criminality, permit the government to use trials as dress rehearsals for future successive prosecutions, and impugn the inviolate nature of jury acquittals. These concerns strike at the heart of the Double Jeopardy Clause.

1. The original "purpose of the double jeopardy rule was to protect against abusive prosecutorial behavior," John H. Langbein et al., *History of the Common Law: The Development of Anglo-American Legal Institutions* 444 (2009), and this continued to be the motivating principle of the rule as it was imported into the United States Constitution and modern jurisprudence, *see, e.g.*, *Brown v. Ohio*, 432 U.S. 161, 165 (1977) ("Because it was designed originally to embody the protection of the common-law pleas . , the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors."); *United States v. Wilson*, 420 U.S. 332, 342 (1975) ("The development of the Double Jeopardy Clause from its common-law origins thus suggests that it was directed at the threat of multiple prosecutions . . . ."); Langbein, *supra*, at 444 ("In modern American practice, the superior resources and the politicized character of the prosecutor's office have been thought to justify the rule against prosecutorial appeal."). In a system where prosecutors have expansive charging authority and an ever-growing number of criminal statutes and incorporated regulations from which to choose in crafting an indictment, the Double Jeopardy Clause is a necessary restraint on the government's power to wield the criminal law against its citizens.

The rule barring the government from prosecuting an individual for the same offense following an *acquittal* in particular has numerous purposes—it "preserve[s] the finality of judgments," *Crist*, 437 U.S. at 33, protects an individual from the grueling and expensive ordeal of multiple trials, *see Green*, 355 U.S. at 187, minimizes the risk of wrongful convictions, *see id.* at 188, and, most importantly, prevents prosecutors from using the criminal justice

system to continually harass individuals who have been tried and acquitted. *See* Martin L. Friedland, *Double Jeopardy* 3–4 (1969) ("The main rationale of the rule against double jeopardy is that it prevents the unwarranted harassment of the accused by multiple prosecutions."). Accordingly, this Court has been clear that "[a]n acquittal is accorded special weight" and "particular significance" in the double jeopardy context, specifically because of the "unacceptably high risk that the [g]overnment, with its superior resources, would wear down a defendant" if given the opportunity to bring successive prosecutions in an effort to secure a conviction. *United States v. DiFrancesco*, 449 U.S. 117, 129–30 (1980).

It is, moreover, "deeply ingrained" in our judicial framework "that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense," thereby "subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green*, 355 U.S. at 187–88. Indeed, it was "[t]o perpetuate this wise rule, so favorable and necessary to the liberty of the citizen in a government like ours," that the Double Jeopardy Clause was "introduc[ed] into our Constitution." *Ex Parte Lange*, 85 U.S. (18 Wall.) at 171.

2. These concerns are especially palpable given the power of the legislative branch to create new, overlapping, and expansive criminal statutes in response to political and public pressures, in turn producing an arsenal of statutory and regulatory provisions that prosecutors can choose from in charging the same underlying conduct or course of con-

duct. There are now innumerable federal and state criminal statutes,[7] and "[m]ore than 300,000 regulations—not even laws—can trigger criminal sanctions."[8]

This concern is far from new. More than 60 years ago, Professor Marlyn E. Lugar warned that, when criminal statutes proliferate without limit, a "prosecutor may, with little imagination and even less research," bring subsequent indictments for nominally different offenses "even though the defendant is being retried for essentially the same anti-social conduct." Marlyn E. Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 Iowa L. Rev. 317, 317 (1954). And if the government is permitted to retry a case under multiple theories, "disregard[ing]" acquittals in the process, it is likely eventually to secure a conviction regardless of whether the defendant is innocent, for "[i]f you play with something long enough, you are likely to break it." Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1, 31 n.158 (1995); *see also, e.g.*, *Ashe*, 397 U.S. at 439–40 (defendants convicted at a second trial following an acquittal due to "substantially stronger" testimony from "witnesses [who] were for the most part the same").

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[7] The Smart on Crime Coalition, *Smart on Crime: Recommendations for the Administration and Congress*, at 2 (2011), *http://www.constitutionproject.org/wp-content/uploads/2014/10/SmartOnCrime_Complete.pdf*.

[8] Ilya Shapiro & Randal John Meyer, *Obama's Weaponized Justice Department*, National Review Online (Oct. 30, 2015), *http://www.nationalreview.com/article/426307/obamas-weaponized-justice-department-ilya-shapiro-randal-john-meyer?target=author&tid=900875*.

3. Subsequent prosecutions would also permit the government to use the first trial as a "dry run," *Ashe*, 397 U.S. at 447, or "dress rehearsal," *United States v. Dixon*, 509 U.S. 688, 749 (1993) (Souter, J., concurring in the judgment in part and dissenting in part). Without the potential preclusive effect of an acquittal, the government need not carefully select appropriate legal theories, as it will have the comfort of knowing that it can retry a case based on lessons learned about the strengths and weaknesses of its evidence and legal theories in the first trial. This opportunity for the prosecutor to "refine[] his presentation in light of the turn of events at the first trial" is "precisely what the constitutional guarantee forbids." *Ashe*, 397 U.S. at 447.

Where the proposed second trial is a result of the government's reckless pursuit of an expansive theory of criminality—here, its efforts to enlarge federal program bribery to permit a conviction on a "gratuity" theory—it is especially "offensive to allow the prosecutor to come into a second trial" seeking to avoid the consequences of his efforts to overreach. Comment, *An Exception to Collateral Estoppel in Criminal Cases Because of Prosecutor's Incompetence?*, 115 U. Pa. L. Rev. 1346, 1354 (1967).

Permitting subsequent prosecutions provides even more advantages to the government, which already possesses disproportionate resources and power. The government would also be able to use the first trial as a discovery device, receiving a "detailed account of the defendant's story," and a preview of the defendant's evidence and witnesses. Elizabeth T. Lear, *Contemplating the Successive Prosecution Phenomenon in the Federal System*, 85 J. Crim. L. & Criminology 625, 647 (1995). Finally, permitting re-

trial following an acquittal vitiates the defendant's right to have a jury of twelve persons stand between the defendant and the power of the state. Under such circumstances, even an innocent defendant may plead guilty to avoid "the expense and the mental fatigue" that accompanies being subjected to numerous criminal trials. *Id.*

Moreover, in seeking to strip the two acquittals of their preclusive effects by dint of a vacated conviction, the government hopes to get the "second bite at the apple" that the Double Jeopardy Clause is intended to prevent. *Burks v. United States*, 437 U.S. 1, 17 (1978); *cf. Green*, 355 U.S. at 193 (rejecting view of Double Jeopardy Clause that would force a defendant to "barter his constitutional protection against a second prosecution for [one] offense . . . as the price of a successful appeal from an erroneous conviction of another offense").

4. The court of appeals' assertion that "the acquittals themselves remain inviolate" and "forever bar" future prosecutions for conspiracy and traveling to violate § 666, Pet. App. 19a n.5, rings profoundly hollow if the government is free to prosecute the petitioners again for the same exact conduct and secure the same exact sentence that would have been available had the jury convicted on every count.[9]

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[9] *See United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam) (holding that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence"); *see also* U.S. Sentencing Guidelines §§ 2X1.1(b)(2) (providing that the sentencing guideline range is the same for conspiracy and the substantive offense where "all of the acts the conspirators believed necessary

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Here, "the jury's acquittals unquestionably terminated petitioner[s'] jeopardy with respect to the issues finally decided in" the conspiracy counts. *Yeager*, 557 U.S. at 119. The government should be precluded from relitigating those issues, including whether defendants agreed to commit the substantive § 666 offense, which is a necessary element of that crime. That the jury also rendered a subsequently vacated verdict of conviction is immaterial. A legal nullity, being a nullity, cannot itself effectively annul simultaneously rendered acquittals.

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on their part for the successful completion of the substantive offense" were completed) & 3D1.2 (providing that "[a]ll counts involving substantially the same harm shall be grouped together" for purposes of determining the appropriate sentencing guideline range).

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

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Supreme Court of the United States

JUAN BRAVO-FERNANDEZ AND
HECTOR MARTINEZ-MALDONADO,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTION PRESENTED

Whether, under *Ashe v. Swenson*, 397 U.S. 436 (1970), and *Yeager v. United States*, 557 U.S. 110 (2009), a vacated, unconstitutional conviction can cancel out the preclusive effect of an acquittal under the collateral estoppel prong of the Double Jeopardy Clause.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. A VACATED, UNCONSTITUTIONAL CONVICTION DOES NOT NULLIFY THE PRECLUSIVE EFFECT OF A UNANIMOUS VERDICT OF "NOT GUILTY" 4

A. The Double Jeopardy Clause Embodies Deep-Rooted Principles That Protect Defendants From Serial Prosecutions 4

B. The Decision Below Is Incompatible With This Court's Double Jeopardy Precedents 10

II. THE PROLIFERATION OF OVERLAPPING CRIMINAL OFFENSES UNDERSCORES THE NEED TO AFFORD ACQUITTALS PROPER WEIGHT IN THE DOUBLE JEOPARDY ANALYSIS 15

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

Arizona v. Washington,
434 U.S. 497 (1978) 12

Ashe v. Swenson,
397 U.S. 436 (1970) ..... *passim*

Ball v. United States,
163 U.S. 662 (1896) 2

Bartkus v. Illinois,
359 U.S. 121 (1959) 4, 5

Benton v. Maryland,
395 U.S. 784 (1969) 2, 7

Brown v. Ohio,
432 U.S. 161 (1977) 14

Burks v. United States,
437 U.S. 1 (1978) 8, 13

Crist v. Bretz,
437 U.S. 28 (1978) 7

Duchess of Kingston's Case,
20 State Tr. 355 (1776) 8, 9

Evans v. Michigan,
133 S. Ct. 1069 (2013) 8

Fong Foo v. United States,
369 U.S. 141 (1962) 8

Green v. United States,
355 U.S. 184 (1957) 2, 7, 8, 15

TABLE OF AUTHORITIES
(continued)

Page(s)

North Carolina v. Pearce,
395 U.S. 711 (1969) 11, 14

Sykes v. United States,
564 U.S. 1 (2011) 17

United States v. DiFrancesco,
449 U.S. 117 (1980) 8

United States v. Halper,
490 U.S. 435 (1989) 6

United States v. Jenkins,
490 F.2d 868 (2d Cir. 1973) 8

United States v. Martin Linen Supply Co.,
430 U.S. 564 (1977) 8

United States v. Oppenheimer,
242 U.S. 85 (1916) 9

United States v. Powell,
469 U.S. 57 (1984) 13, 14

United States v. Scott,
437 U.S. 82 (1978) 10, 15

United States v. Tateo,
377 U.S. 463 (1964) 12

United States v. Wilson,
420 U.S. 332 (1975) 15

Yeager v. United States,
557 U.S. 110 (2009) ..... *passim*

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 4

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

18 U.S.C. § 666 3

28 U.S.C. § 2111 13

Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 84 15

RULES

Fed. R. Crim. P 52(a) 13

OTHER AUTHORITIES

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TABLE OF AUTHORITIES
(continued)

Page(s)

Over-Criminalization of Conduct / Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary, 111th Cong. 7 (2009) 17

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BRIEF OF CRIMINAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This brief is submitted on behalf of a group of criminal law professors in support of petitioners.[1]

INTEREST OF *AMICI CURIAE*

This case presents an important question of criminal law and procedure: Whether a jury's acquittal retains its preclusive effect under the Double Jeopardy Clause where the acquittal was logically inconsistent with the same jury's vacated, unconstitutional conviction on another count. The undersigned *amici* are professors of criminal law and procedure. While they have varied views on many topics, all of them have a particular interest in ensuring the continued vitality and coherence of the Constitution's protections for the accused, including the Double Jeopardy Clause of the Fifth Amendment. As scholars in the field, *amici* have a unique perspective on both the legal rules and underlying principles that govern in this area.

A full list of *amici* is attached as an appendix to this brief.

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters reflecting their consent have been filed concurrently herewith.

INTRODUCTION AND SUMMARY OF ARGUMENT

The constitutional prohibition against double jeopardy reflects the "universal and humane principle of criminal law that no man shall be brought into danger more than once for the same offense." *Ball v. United States*, 163 U.S. 662, 668 (1896) (quotation omitted). The rule is "an indispensable requirement of a civilized criminal procedure," *Green v. United States*, 355 U.S. 184, 200 (1957) (Frankfurter, J., dissenting), that is "fundamental" to "our constitutional heritage," *Benton v. Maryland*, 395 U.S. 784, 794 (1969). Its deep historical roots can be traced to the ancient Greeks and Romans. And it serves several important, related functions: protecting defendants from the ordeal of multiple trials, minimizing the attendant risk that the government will eventually secure a conviction against an innocent individual, and preserving the finality of judgments.

Of particular significance here, the Court held in *Ashe v. Swenson*, 397 U.S. 436 (1970), that the Double Jeopardy Clause embodies the longstanding principle that a jury's verdict of "not guilty" precludes retrial not only on the same charge, but on any issue necessarily decided in the defendant's favor by the acquittal—i.e., that the Double Jeopardy Clause includes a collateral estoppel prong. The Court reaffirmed that principle in *Yeager v. United States*, 557 U.S. 110 (2009), and concluded that when a jury acquits on one count but hangs on another, the acquittal precludes retrial on the hung count if, by acquitting, the jury necessarily decided facts essential to the hung count in the defendant's favor—

regardless of whether the jury's failure to reach a verdict is seemingly inconsistent with its acquittal.

Those holdings dictate the result in this case. Petitioners have been acquitted of conspiring and traveling to violate 18 U.S.C. § 666, which prohibits federal-program bribery, yet the government seeks to re-prosecute them for the underlying § 666 offense now that their conviction on that count has been vacated because of a legally erroneous (and non-harmless) jury instruction. But just like the hung counts at issue in *Yeager*, petitioners' vacated convictions have no legal effect, and thus can carry no weight in the collateral estoppel analysis. The only remaining verdicts are the acquittals, and those acquittals accordingly must be afforded their full preclusive effect.

Modern developments in criminal law and procedure underscore the need for rigorous enforcement of the Double Jeopardy Clause's protections, including its collateral estoppel component. The federal criminal code has undergone a dramatic expansion over the last several decades, and prosecutors now commonly charge defendants with multiple overlapping felonies based on a single course of conduct. Such prosecutions can easily produce inconsistent verdicts, as they did in this case. By declaring that such inconsistency on its own eliminates the double jeopardy protections that would otherwise follow from an acquittal—even if the jury's convictions are later declared legally void—the decision below encourages prosecutors to bring duplicative charges. It also reduces the government's incentives to avoid legal error in the first place by guaranteeing the government a second chance so long as it is able to ob-

tain at least one conviction in an initial trial, no matter how flawed.

The rule adopted by the First Circuit strips acquittals of the special status they have long been afforded under the Double Jeopardy Clause, and it substantially dilutes the Clause's protection against "unfair and abusive reprosecutions." *Ashe*, 397 U.S. at 445 n.10. The decision below should be reversed.

ARGUMENT

I. A VACATED, UNCONSTITUTIONAL CONVICTION DOES NOT NULLIFY THE PRECLUSIVE EFFECT OF A UNANIMOUS VERDICT OF "NOT GUILTY"

A. The Double Jeopardy Clause Embodies Deep-Rooted Principles That Protect Defendants From Serial Prosecutions

1. a. The Double Jeopardy Clause of the Fifth Amendment provides that "[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V The Constitution's protection against double jeopardy is the "most ancient" procedural protection in the Bill of Rights, with roots tracing back more than two thousand years. *See* Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 81 (1978). Indeed, "[f]ear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization." *Bartkus v. Illinois*, 359 U.S. 121, 151 (1959) (Black, J., dissenting).

In 355 B.C., Athenian statesman Demosthenes said that the law "forbid[s] the same man to be tried

twice on the same issue." Demosthenes, *Against Leptines*, in Demosthenes pt. 20, § 147 (C.A. Vince & J.H. Vince trans., Harvard Univ. Press 1926). The Roman law encompassed the maxim *nemo debet bis puniri pro uno delicto*, meaning that no person should be punished twice for the same offense, a more specific version of the principle *nemo debet bis vexari pro una et eadem causa*, which translates as "[n]o one should be twice troubled for the same cause." Black's Law Dictionary 1933 (10th ed. 2014). The Digest of Justinian explains that "[t]he governor must not allow a man to be charged with the same offenses of which he has been acquitted." 4 The Digest of Justinian bk. 48, pt. 2, § 7.2 (Ulpian, Duties of Proconsul 7), at 797 (Theodor Mommsen et al. eds., Univ. of Pa. Press 1985). Ancient Jewish law also contains several references to the concept of double jeopardy, including in the Babylonian Talmud, a collection of teachings of Rabbinic Judaism compiled around 450 to 500 A.D. *See* David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 Wm. & Mary Bill Rts. J. 193, 197 (2005). The principle that no person may be tried multiple times for the same offense survived through the Middle Ages as part of the canon law, and into the Renaissance. *See Bartkus*, 359 U.S. at 152 (Black, J., dissenting) (discussing the writings of St. Jerome); Rudstein, *supra*, at 200-02 (discussing the Gregorian Decretals and the King James Bible).

By the thirteenth century, the prohibition on double jeopardy had become firmly established in English common law A defendant could use one of four "pleas in bar"—*autrefois acquit*, *autrefois con-*

vict, *autrefois attaint*, and "former pardon"—to argue, respectively, that he had already been acquitted, convicted, attainted, or pardoned of the offense charged. Donald Eric Burton, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 Ohio St. L.J. 799, 801 (1988). The plea of *autrefois acquit*, Blackstone concluded, "is grounded on this univer[s]al maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offen[s]e." 4 William Blackstone, Commentaries 326, 329 (1769). Although Blackstone's reference to the "same offense" today might appear to mean the same *statutory* offense, "Blackstone made quite clear that the focus was on blameworthy acts and not on offense descriptions." George C. Thomas III, Double Jeopardy: The History, The Law 84 (1998).

b. Double jeopardy principles were well understood by the time of the Founding. In 1641, Massachusetts included an express guarantee against double jeopardy in its Body of Liberties, which formally extended the protection to non-capital offenses and served as a model for many other colonies and, ultimately, for the Bill of Rights. *See United States v. Halper*, 490 U.S. 435, 440 (1989); Rudstein, *supra*, at 221-22. New Hampshire incorporated a prohibition against double jeopardy into its constitution in 1784. Rudstein, *supra*, at 223. And while the legislative history is limited, the debates surrounding Congress's adoption of the Double Jeopardy Clause reveal that it was intended to memorialize well-established common law principles. *See* 1 Annals of Cong. 781-82 (1789) (Joseph Gales ed., 1834) (statements of Reps. Benson, Sherman, and Livermore);

see also Burton, *supra*, at 802 ("Congress apparently did intend the clause to conform to 'universal practice' in Great Britain and the United States."). Indeed, the language in the Clause is substantively identical to that in Blackstone's Commentaries. Following the Civil War and ratification of the Fourteenth Amendment, the bar on double jeopardy was incorporated against the States as one of the Constitution's fundamental protections of individual liberty. *Benton*, 395 U.S. at 794.

2. Over time, this Court has distilled and clarified the principles underlying the Double Jeopardy Clause's prohibitions against successive prosecutions and duplicative punishments. The Court has explained that the Clause reflects "the 'deeply ingrained' principle that 'the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'" *Yeager*, 557 U.S. at 117-18 (quoting *Green*, 355 U.S. at 187-88).

A closely related "primary purpose" of the Double Jeopardy Clause—derived from the common law pleas of *autrefois acquit* and *autrefois convict*—is to preserve the finality of judgments. *Crist v. Bretz*, 437 U.S. 28, 33 (1978); *see Yeager*, 557 U.S. at 118. The principle of finality, however, does not apply with equal force to acquittals and convictions. "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence" is that a verdict of acquittal cannot be reviewed on appeal if a second

trial would be necessitated by a reversal. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). Even an acquittal "based upon an egregiously erroneous foundation" is unassailable. *Fong Foo v. United States*, 369 U.S. 141, 143 (1962); *see Green*, 355 U.S. at 188 ("[I]t is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous."); *see also Evans v. Michigan*, 133 S. Ct. 1069, 1074-76 (2013) (applying *Fong Foo* and *Martin Linen* to conclude that Double Jeopardy Clause bars retrial even when the trial court grants an acquittal based on the prosecution's failure "to prove an 'element' of the offense that, in actuality, it did not have to prove"). A conviction, by contrast, can be reviewed for error, and a successful reversal (on any ground other than insufficiency of evidence) poses no bar to further prosecution. *Burks v. United States*, 437 U.S. 1, 18 (1978).

Acquittals are thus "accorded special weight" under the Double Jeopardy Clause. *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980). Indeed, since the time of the Founding, the rule has been that "'whenever, and by whatever means, there is an acquittal in a criminal prosecution, the scene is closed and the curtain drops.'" *United States v. Jenkins*, 490 F.2d 868, 872 n.6 (2d Cir. 1973) (quoting *Duchess of Kingston's Case*, 20 State Tr. 355, 528 (1776)).

3. The principles underlying the Double Jeopardy Clause prevent the government from relitigating not only *charges* on which a previous jury has reached an acquittal (res judicata or claim preclusion), but also *factual elements* necessarily decided

by such a verdict (collateral estoppel or issue preclusion). Even before the adoption of the Bill of Rights, English courts had established that there was a collateral estoppel component to the prohibition against double jeopardy. *See Duchess of Kingston's Case*, 20 State Tr. at 535. In the United States, collateral estoppel has been an established rule of federal criminal law for at least a century. *Ashe*, 397 U.S. at 443 (citing *United States v. Oppenheimer*, 242 U.S. 85 (1916)).

This Court's decision in *Ashe* vividly illustrates the importance of the collateral estoppel aspect of the Double Jeopardy Clause. There, a group of masked men robbed six poker players, and the defendant was charged with (and acquitted of) robbing one of them. *Ashe*, 397 U.S. at 438-39. The government then sought to prosecute him for robbing one of the *other* players (and presumably, if unsuccessful, would have sought to prosecute him in turn for robbing each of the other four victims). *Id.* at 439. The second prosecution—based on testimony from largely the same cohort of witnesses as the first—was successful. *Id.* at 439-40. But this Court concluded that the second prosecution was constitutionally prohibited, because the issue of whether the defendant was one of the robbers was necessarily decided in the defendant's favor when he was acquitted in the first trial. *Id.* at 446. The Double Jeopardy Clause, the Court explained, prohibits the government from treating a trial resulting in an acquittal as a "dry run" for a second prosecution of the same individual for virtually the same offense. *Id.* at 447

B. The Decision Below Is Incompatible With This Court's Double Jeopardy Precedents

The First Circuit's conclusion that a vacated, unconstitutional conviction based on a legally erroneous instruction can undermine the effect of an undisputedly valid acquittal is irreconcilable with the history and purposes of the Double Jeopardy Clause, and with this Court's decisions interpreting it.

1. As explained above, this Court has long recognized that "the law attaches particular significance to an acquittal." *United States v. Scott*, 437 U.S. 82, 91 (1978); *see supra* at 7-8. The Court reaffirmed that principle in *Yeager* when it held that an acquittal retains its preclusive effect even where the same jury was unable to reach a verdict on related counts. 557 U.S. at 122.

In *Yeager*, the jury acquitted the defendant of multiple counts of securities fraud, wire fraud, and conspiracy to commit those offenses. *Id.* at 114. At the same time, the jury was unable to reach a verdict on related charges of insider trading and money laundering, and the court declared a mistrial on those counts. *Id.* at 114-15. When the government attempted to retry the defendant on the hung counts, the defendant objected that doing so would violate the collateral estoppel prong of the Double Jeopardy Clause, because the jury had necessarily decided controlling issues of fact in his favor through its acquittals. *Id.* at 115. On appeal, the Fifth Circuit reasoned that because the hung counts were logically inconsistent with the acquittals, the government should not be prevented from retrying the in-

sider trading and money laundering charges—i.e., that the "inconsistent" hung counts deprived the jury's acquittals of their ordinary preclusive effect. *See id.* at 116.

This Court rejected that view, holding that a jury's acquittal can preclude the government from retrying a defendant on hung counts even when the failure to reach a verdict on those counts is logically inconsistent with the acquittal. That result, the Court explained, followed from its decision in *Ashe*, in which it "squarely held that the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial"—full stop. *Yeager*, 557 U.S. at 119. And while *Ashe* "involved an acquittal for a single offense" and *Yeager* instead "involve[d] an acquittal on some counts and mistrial declared on others," the Court nonetheless found *Ashe*'s reasoning "controlling" because, for double jeopardy purposes, "the jury's inability to reach a verdict on the insider trading counts was a nonevent and the acquittals on the fraud counts" were therefore "entitled to the same effect as Ashe's acquittal." *Id.* at 120.

2. *Yeager*'s analysis applies equally here. A vacated conviction is just as much a "nonevent" as a failure to reach a verdict. Like hung counts, vacated convictions carry no legal weight; they have been "wholly nullified and the slate wiped clean." *North Carolina v. Pearce*, 395 U.S. 711, 721 (1969); *see* Black's Law Dictionary 1782 (10th ed. 2014) (defining "vacate" as "[t]o nullify or cancel; make void; invalidate").

Indeed, the fact that vacated convictions have no legal effect is one of the reasons why, like hung counts or mistrials granted out of manifest necessity, they do not terminate the defendant's original jeopardy and can ordinarily be retried without offending double jeopardy principles. *See United States v. Tateo*, 377 U.S. 463, 465 (1964) ("The principle that [the Double Jeopardy Clause] does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of our constitutional jurisprudence."); *see also Arizona v. Washington*, 434 U.S. 497, 505-06 (1978). But as the Court recognized in *Yeager*, the preclusive effect of an acquittal *separately* terminates the defendant's original jeopardy as to factual issues necessarily decided in that acquittal, thereby preventing retrial on counts that otherwise could be retried. 557 U.S. at 119 ("[T]he jury's acquittals unquestionably terminated petitioner's jeopardy with respect to the issues finally decided in those counts.").

To be sure, a vacated conviction, unlike a hung count, was at one point a unanimous jury verdict, and the Court in *Yeager* noted that hung counts do not factor into the collateral estoppel analysis under *Ashe* because "a jury speaks only through its verdict." *Id.* at 121. But what matters for double jeopardy purposes is that a conviction vacated as a result of an erroneous instruction tells the reviewing court nothing about what a *properly instructed* jury would have concluded looking at the same evidence; as with a hung count, "there is no way to decipher" its exact meaning. *Id.* A vacated conviction is thus just as

irrelevant to the collateral estoppel analysis as a hung count.

3. The First Circuit believed that *United States v. Powell*, 469 U.S. 57 (1984), required it to treat vacated convictions differently than hung counts for collateral estoppel purposes, but *Powell* does no such thing. In *Powell*, the defendant was acquitted of various drug offenses but convicted of telephone facilitation of those same offenses. 469 U.S. at 59-60. This Court upheld the defendant's convictions even though they were logically inconsistent with the acquittals, explaining that that inconsistency made principles of collateral estoppel "no longer useful" for determining whether the convictions could stand. *Id.* at 68.

Powell's holding accordingly gives effect to two inconsistent but otherwise *valid* and final verdicts. Of course, a conviction that is later vacated due to error is neither valid nor final. And where a conviction has been vacated, the jury's decision was based on an error that was—by definition—not harmless. 28 U.S.C. § 2111; Fed. R. Crim. P 52(a). If it were clear how the jury would have decided the case absent the legal error, there would be no need for a retrial, because either the conviction would be affirmed or an acquittal would be ordered. *See Burks*, 437 U.S. at 18 (court must direct judgment of acquittal where evidence was legally insufficient to support conviction). Under *Powell*, even a *valid* "clearly inconsistent verdict" cannot be used to "second-guess the soundness of another verdict." *Yeager*, 557 U.S. at 125. It necessarily follows that an *invalid* inconsistent verdict cannot be used for that purpose.

Powell, moreover, dealt with two valid verdicts simultaneously rendered by the same jury at the conclusion of one trial. "[F]aced with jury verdicts that, on their face, were logically inconsistent," the Court "refused to impugn the legitimacy of either verdict." *Yeager*, 557 U.S. at 125. Here, by contrast, it is petitioners' successful appeal that has stripped their convictions of their "legitimacy." The government seeks to secure a conviction against petitioners on the underlying § 666 offense in a second, separate trial, when there is already a valid acquittal deciding common factual issues in petitioners' favor. Conducting a second trial after an acquittal—a situation not presented in *Powell*—was one of the primary evils the Double Jeopardy Clause was designed to prevent. *See Yeager*, 557 U.S. at 117 (Double Jeopardy Clause embodies "the deeply ingrained principle that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense" (quotation omitted)); *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (Double Jeopardy Clause "protects against a second prosecution for the same offense" following acquittal or conviction (quoting *Pearce*, 395 U.S. at 717)).

In this case, the government is attempting to use petitioners' invalidated convictions to revoke the preclusive effect of the jury's valid verdicts of acquittal—just as it attempted to use the hung counts in *Yeager*. The Court rejected the government's effort in *Yeager*, and it should do so again here.

II. THE PROLIFERATION OF OVERLAPPING CRIMINAL OFFENSES UNDERSCORES THE NEED TO AFFORD ACQUITTALS PROPER WEIGHT IN THE DOUBLE JEOPARDY ANALYSIS

As this Court has long recognized, the Double Jeopardy Clause's history helps inform its modern application. *See, e.g.*, *Scott*, 437 U.S. at 87; *United States v. Wilson*, 420 U.S. 332, 339-42 (1975); *see also Green*, 355 U.S. at 199 (Frankfurter, J., dissenting). But there can be no question that the backdrop against which the Clause operates today is radically different from that at the time of the Founding.

When "the Fifth Amendment was adopted, its principles were easily applied, since most criminal prosecutions proceeded to final judgment, and neither the United States nor the defendant had any right to appeal an adverse verdict"—meaning that the jury's verdict "was unquestionably final, and could be raised in bar against any further prosecution for the same offense." *Scott*, 437 U.S. at 88 (citing Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 84); *see Green*, 355 U.S. at 189 ("At common law a convicted person could not obtain a new trial by appeal except in certain narrow instances."). As Congress expanded defendants' right to appeal, the double jeopardy analysis grew more complex, *see Scott*, 437 U.S. at 88, but the Court continued to reaffirm the vitality of the principles at the Clause's core.

More than procedure has changed: the criminal code itself has undergone a dramatic transformation that has greatly increased the avenues through which the government can secure a conviction. For

centuries, the common law (and, later, the federal criminal code) had "offense categories [that] were relatively few and distinct. A single course of criminal conduct was likely to yield but a single offense." *Ashe*, 397 U.S. at 445 n.10. In the late 1500s and early 1600s, for example, there were only 30 felony offenses. 2 J. Stephen, A History of the Criminal Law of England 219 (1883). By the time of the Founding, the number of felonies had grown to just 160. *Id.* And the Founders advocated restraint in introducing more or redundant laws, warning that "[i]t will be of little avail to the people ... if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood." The Federalist No. 62 (James Madison).

Today, however, criminal laws are enacted at dizzying speed, with roughly one new federal criminal statute passed each week. *See* John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*, Heritage Found. Legal Mem. No. 26, at 1 (June 16, 2008). By 1989, the Department of Justice estimated that there were roughly 3,000 federal crimes. R. Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 Crim. L.F. 99, 110 (1989). By 2000, the number has risen to over 4,000. John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, Federalist Society 8 (2004). And by 2008, there were an estimated 4,500 criminal offenses on the books. Baker, *Revisiting the Explosive Growth*, *supra*, at 1. Altogether, more than 40 percent of all federal criminal provisions enacted since the Civil War have been passed in the years after 1970. ABA Task Force on the Federalization of

Criminal Law, *The Federalization of Criminal Law* 7 (1998).[2]

Today, new crimes are "enacted in patchwork response to newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need." *Id.* at 14-15. Politicians often pass "[f]uzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation" when they "want[] credit for addressing a national problem but do[] not have the time (or perhaps the votes) to grapple with the nitty-gritty." *Sykes v. United States*, 564 U.S. 1, 35 (2011) (Scalia, J., dissenting); *see also* William Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 529-33 (2001). The result is a criminal code that has been described as a "haphazard grab bag of statutes" that can be "incomprehensible, random and incoherent, duplicative, ambiguous, incomplete, and organizationally nonsensical." Julie O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. Crim. L. & Criminology 643, 643 (2006) (quotations omitted).

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[2] The universe of potential federal crimes expands exponentially when one takes into account federal regulations that can trigger criminal sanctions; there may be as many as 300,000 federal regulations that can be enforced criminally. *See Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 7 (2009) (testimony of Richard Thornburgh, former Att'y Gen. of the United States); *see also* Lawrence M. Friedman, Crime and Punishment in American History 282-83 (1993) (regulatory crimes "now exist in staggering numbers").

The modern explosion in federal criminal law has produced an "extraordinary" number of "overlapping and related statutory offenses," allowing prosecutors to "spin out a startlingly numerous series of offenses for a single alleged criminal transaction." *Ashe*, 397 U.S. at 445 n.10. Prosecutorial discretion is no longer so much "an exercise of wisdom" as "a selection of weaponry." Robert Weisberg, *Crime and Law: An American Tragedy*, 125 Harv. L. Rev. 1425, 1445 (2012). And "[a]s the number of statutory offenses [has] multiplied, the potential for unfair and abusive reprosecutions" has grown "far more pronounced." *Ashe*, 397 U.S. at 445 n.10; *see id.* at 452 (Brennan, J., concurring) ("Given the tendency of modern criminal legislation to divide the phrases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening.").

What is more, prosecutors frequently advocate expansive readings of federal criminal statutes—especially those that are vague and open-ended—pushing the statutes' scope beyond any limits discernible from the text or other indicators of Congressional intent. *See* Baker, *Revisiting the Explosive Growth*, *supra*, at 6. In doing so, they may further inflate the number of criminal prohibitions potentially implicated by a single course of conduct.

It is hardly surprising that when prosecutors bring an array of overlapping charges, the jury's verdicts are sometimes logically inconsistent—whether as a result of confusion or compromise. If inconsistency in the jury's verdict alone were enough to strip an acquittal of its preclusive effect, the government would have every incentive to bring as

many charges as possible to increase its chances of securing at least one conviction to diminish the impact of any acquittal. And if even an *invalid*, vacated conviction sufficed to nullify an acquittal's preclusive effect, the government's incentives to avoid legal error in the first trial would also be diminished: So long as the government secured a conviction on any count, even if only through impermissible overreaching, it could try again with a new jury and new legal theory regardless of what the jury necessarily decided on other counts in the defendant's first trial.

The collateral estoppel doctrine embedded in the Double Jeopardy Clause protects defendants against precisely such "unfair and abusive reprosecutions," *Ashe*, 397 U.S. at 445 n.10, in which the government treats a defendant's first trial as "no more than a dry run" for a second, *id.* at 447. It does so in part by ensuring that a jury's unanimous verdict of "not guilty" is given the full weight to which this Court has affirmed it is entitled. When an acquittal is afforded that special weight, a legally null, vacated conviction cannot neutralize its preclusive effect.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Supreme Court of the United States

JUAN BRAVO-FERNANDEZ AND HECTOR MARTÍNEZ-MALDONADO,

Petitioners,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICUS CURIAE* FOR NATIONAL ASSOCIATION FOR PUBLIC DEFENSE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Interest 1

Summary of Argument 2

ARGUMENT 5

I. The First Circuit's Rule Erodes the Integrity of Jury Verdicts 5

II. Respecting The Preclusive Effect of a Final Acquittal Furthers the Core Principles Animating the Double Jeopardy Clause 17

III. Practical Realities of the Criminal Justice System Make Adherence to The *Ashe* Rule Critically Important 22

A. Prosecutors Should Be Required To Accept the Consequences of Their Decision to Pursue Multiple, Related Charges 22

B. The First Circuit's Rule Creates Serious Problems of Fairness and Administrability 26

Conclusion 29

TABLE OF AUTHORITIES

Cases: **Page(s)**

Andrade-Zamora v. *Lynch*,
814 F.3d 945 (8th Cir. 2016) 16

Arizona v. *Washington*, 434 U.S. 497 (1978) 5, 16, 20

Ashe v. *Swenson*, 397 U.S. 436 (1970) ..... *passim*

Ball v. *United States*, 163 U.S. 662 (1896) 5

Bates v. *Union Oil Co. of Calif.*,
944 F.2d 647 (9th Cir. 1991) 14

Benton v. *Maryland*, 395 U.S. 784 (1969) 27

Bullington v. *Missouri*, 451 U.S. 430 (1981) 14

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Duncan v. *Louisiana.*, 391 U.S. 145 (1968) 18, 19

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611 F.3d 1337 (11th Cir. 2010) 16

Green v. *United States*,
355 U.S. 184 (1957) ..... *passim*

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254 U.S. 135 (1920) 10

Hyde v. *United States*, 225 U.S. 347 (1912) 6

Jones v. *United States*, 526 U.S. 227 (1999) 5, 19

Justices of Boston Mun. Court v. *Lydon*,
466 U.S. 294 (1984) 16, 20

Laffler v. *Cooper*, 132 S. Ct. 1376 (2012) 24

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McDonald v. *Pless*, 238 U.S. 264 (1915) 17

Missouri v. *Frye*, 132 S. Ct. 1399 (2012) 24

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No East-West Highway Committee, Inc. v.
Chandler, 767 F.2d 21 (1st Cir. 1985) 15

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One Lot Emerald Cut Stones v. *United States*, 409 U.S. 232 (1972) 9

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Patton v. *United States*, 281 U.S. 276 (1930) 19

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United Blvd. of Carpenters & Joiners v. *Operative Plasterers' & Cement Masons' Int'l Ass'n*, 721 F.3d 678 (D.C. Cir. 2013) 15

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696 F.3d 1104 (11th Cir. 2012) 27

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United States v. *Jones*,
808 F.2d 561 (7th Cir. 1986) 27

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775 F.2d 1050 (8th Cir. 1985) 15

United States v. *Oppenheimer*, 242 U.S. 85 (1916) 8

United States v. *Powell*,
469 U.S. 57 (1984) 2, 11, 12, 13

United States v. *Russell*,
221 F.3d 615 (4th Cir. 2000) 16

United States v. Scott, 449 U.S. 82 (1978)..... 5 , 10

Vaise v *Delaval*, 99 Eng. Rep. 944 (K.B. 1785)..... 6

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Yeager v *United States*, 557 U.S. 110 (2009).....*passim*

Laws, Rules, and Legislative Masterials

U.S. Const. art. III, § 2, cl. 3 18

18 U.S.C. § 666 ..... 6, 8, 21

18 U.S.C. § 1341 24

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Fed. R. Civ. P 49 9

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Other Materials

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INTEREST OF *AMICUS CURIAE*

The National Association for Public Defense (NAPD) is an association of nearly 11,000 professionals who provide the full spectrum of services necessary to make the constitutional right to effective assistance of counsel a reality. Its members counsel and advocate for clients, both adults and juveniles—in jails and community settings, as well as in courtrooms. NAPD's ranks include practitioners in state, county, and local systems, who work through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital and appellate offices, using a diversity of traditional and holistic practice models. Their collective expertise extends beyond abstract questions of legal doctrine, to the practical, day-to-day realities of the criminal justice system.

This case concerns matters at the core of NAPD's mission and practical expertise. The Constitution's guarantee of a trial by jury for "all Crimes," already under withering pressure, would be further degraded if, as the court of appeals held, juries' valid final verdicts of acquittal may be cast aside—and defendants subject to further prosecution—based on claims of the jury's "irrationality" and the acquittal's incompatibility with a *vacated* conviction.

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*Pursuant to Rule 37.6, counsel certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus* or counsel made a monetary contribution to its preparation or submission. Counsel for all parties have consented to its filing.

SUMMARY OF ARGUMENT

In *Ashe* v. *Swenson*, 397 U.S. 436 (1970), this Court held that the Double Jeopardy Clause precludes the government from relitigating any issue that was necessarily decided in a prior case resulting in a defendant's acquittal. Neither the government nor the First Circuit below disputed that, under *Ashe*, petitioners' acquittal on Travel Act and conspiracy charges would, in light of the factual and legal theory of that prosecution, make a subsequent 18 U.S.C. § 666 prosecution unconstitutional. But the court nonetheless held that the jury's valid, final, and unambiguous acquittal was stripped of this preclusive effect by the presence of an inconsistent *vacated* verdict.

I. This restrictive new limitation—premised on the notion that the protections of the Double Jeopardy Clause depend on a second court's assessment of the "rationality" of a prior jury acquittal—reflects a basic misreading of this Court's precedents. Those decisions, including *Ashe*, *Yeager* v. *United States*, 557 U.S. 110 (2009), and *United States* v. *Powell*, 469 U.S. 57 (1984), do not invite courts to examine the rationality of prior jury verdicts. Rather, those cases require that a court asked to try a previously acquitted defendant must *presume*—conclusively—that the acquittal was a rational determination and give preclusive effect accordingly.

II. The First Circuit's strange rule—which treats valid final acquittals as nonevents, while giving controlling effect to guilty verdicts that have been *vacated* as unconstitutional—is at odds with this Nation's constitutional and legal tradition and irreconcilable with Double Jeopardy fundamentals.

Even in civil litigation, courts do not parcel out preclusive effect based on the correctness or rationality of the underlying judgments; and the First Circuit's rule is even more of a departure than might first appear. The presumption of irrationality attaching to the acquittal in cases like this one is irrefutable; as *Ashe* explained, a criminal defendant, unlike a civil litigant, has no practical means of establishing what the jury *actually* decided by a general verdict of acquittal and of thereby showing that the acquittal was rational (and that the apparently incompatible, vacated conviction was not).

In fact, the First Circuit rule defies the central tenet of this Court's Double Jeopardy case law: that judgments of acquittal, and jury verdicts of acquittal in particular, are unassailable. This rule of absolute finality respects the Constitution's central guarantee of a right to trial by jury in every criminal case and the jury's role as a bulwark against judicial and prosecutorial overreach. The sanctity of jury verdicts would be gravely compromised if otherwise forbidden repetitive prosecutions could be maintained on the ground that a first, unwelcome judgment of acquittal was rendered by an "irrational" jury.

III. Practical realities of the present-day criminal justice system increase the value of the Double Jeopardy protection recognized in *Ashe* and amplify the significance, unfairness, and impracticality of the First Circuit's erroneous rule. As *Ashe* recognized, the proliferation of overlapping criminal offenses has significantly increased the danger of repetitive prosecutions on theories of guilt rejected by a jury. but on charges that are not strictly the "same offence." That same development, which has accelerated

alarmingly since 1970, also puts immense pressure on the jury trial right *at the front end*, by affording prosecutors large and unchecked power to raise the costs of a defendant's going to trial, rather than accepting a plea bargain. The First Circuit's rule would make matters worse still. If jury inconsistency—and specifically inconsistency claimed based on *vacated*, unconstitutional verdicts—has the effect of defeating protections accorded valid, final acquittals, prosecutors have further incentive to pursue a "kitchen sink" charging approach. And defendants who have been lawfully acquitted are worse off if prosecutors obtain an unconstitutional conviction on an overlapping charge than if a properly instructed jury deadlocks. The rule adopted below, finally, would create serious problems of administrability in the predictably larger class of cases where post-acquittal prosecutions are attempted.

ARGUMENT

I. The First Circuit's Rule Erodes the Integrity of Jury Verdicts

1. The Double Jeopardy Clause vindicates the right to trial by jury by protecting the sanctity of jury verdicts—especially acquittals. Indeed, "it has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy" *Green* v. *United States*, 355 U.S. 184, 188 (1957); accord *Ball* v. *United States*, 163 U.S. 662, 671 (1896) ("The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the constitution."). In this way, "[t]he law attaches particular significance to an acquittal." *United States* v. *Scott*, 449 U.S. 82, 91 (1978).

The "special weight [attached] to judgments of acquittal," *Tibbs* v. *Florida*, 457 U.S. 31, 41 (1982), flows from our legal tradition's strong and essentially absolute commitment to jury sovereignty. That principle dates back to the Magna Carta, see *United States* v. *Booker*, 543 U.S. 220, 239 (2005), and extends even to "flat-out acquittals in the face of guilt," which were understood to represent "'pious perjury' on the jurors' part." *Jones* v. *United States*, 526 U.S. 227, 245 (1999) (quoting 4 W Blackstone, Commentaries on the Laws of England 238–239 (1769)); see also *Arizona* v. *Washington*, 434 U.S. 497, 503 (1978) ("The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'") (quoting *Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962)). Thus, a jury verdict will not be

overturned based on evidence that it was reached by a coin toss, *Vaise* v *Delaval*, 99 Eng. Rep. 944 (K.B. 1785) (Lord Mansfield, C.J.), cited in *Yeager*, 557 U.S. at 122; a bargain, *Hyde* v. *United States*, 225 U.S. 347, 383–384 (1912); or by a jury under the influence of drugs and alcohol, *Tanner* v. *United States*, 483 U.S. 107, 125 (1987).

2. Essential to the respect that the jury is owed is the *Ashe* rule: "'[W]hen an issue of ultimate fact has once been determined by a valid and final judgment' of acquittal, 'it cannot again be litigated' in a second trial for a separate offense." *Yeager*, 557 U.S. at 119 (quoting *Ashe*, 397 U.S. at 443). That is, a prosecution that would require the government to prove something inconsistent with what an acquitting jury logically must have determined may not be brought.

The First Circuit did not deny that, in light of the evidence the prosecution presented in this case and the theory of guilt it argued to the jury, the verdicts of acquittal would logically be understood to rest on determinations that Bravo and Martínez did *not* violate 18 U.S.C. § 666. See Pet. App. 13a-14a. The court nonetheless refused to attach preclusive effect to the verdicts of acquittal, announcing an exception to *Ashe*'s general rule: The acquittals, the court held, "lose the[ir] collateral estoppel effect" if inconsistent with verdicts of guilty that *have been vacated* as unlawful on appeal. *Id.* 15a. This divestment of "otherwise available" Double Jeopardy protections, the First Circuit declared, "follow[ed] in large part from *Ashe* itself," *id.* 16a, highlighting this Court's instruction that courts accord preclusive effect based on what a "rational jury" "necessarily decided" by its acquittal and do so by "a 'practical' analysis' * * * with

'an eye to all the circumstances of the [prior] proceedings.'" *Ibid.* (quoting *Ashe*, 397 U.S. at 444) (some internal quotation marks omitted).

That misunderstands *Ashe*, which was premised on recognition that a practical preclusion approach was necessary because a "more technically restrictive [test] would * * * amount to a rejection of the rule of collateral estoppel in [all] criminal proceedings." 397 U.S. at 444. Allegedly robbing one poker player, the Court reasoned, is not literally the "same offence," U.S. Const. amend. V, as robbing someone else playing at the table, and, given that criminal juries render general verdicts, the second court could not know for certain what the jury *actually* decided when it acquitted in the first trial. Because a defendant seeking to avoid a second prosecution could not, as a practical matter, prove that the jury had acquitted on "rational" grounds—that is, based on insufficient evidence that the defendant was present, rather than on, *e.g.*, a belief that the robbery had never occurred, *Ashe* held that the judgment must be treated as embodying determinations that a rational jury, presented with the prosecution's evidence and theory of guilt, *would have made* in acquitting.

The First Circuit's ostensibly "practical" approach does the opposite; it makes jury "rationality" a *precondition* for preclusion and then places on the re-prosecuted defendant the essentially impossible burden of showing what the jury *actually* decided in acquitting him or her. *Ashe* imposed no such precondition. Rather, *Ashe* recognized criminal defendants' right to a general verdict, the impermissibility of inquiring into jury deliberations, and the reality that juries can and do act

irrationally—*e.g.*, by "disbeliev[ing] substantial and uncontradicted evidence of the prosecution on a point the defendant [does] not contest." 397 at 444 n.9. Accordingly, the Court announced a rule for determining what an acquittal *means* for Double Jeopardy purposes, establishing an objective, elements-based test that looks to whether the jury rationally "*could have* grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." 397 U.S. at 444 (emphasis added).

Here, petitioners showed that a rational jury could not have acquitted them based on the elements of interstate travel or agreement. They thus successfully established that the acquittal must logically be understood to mean that the prosecution failed to prove an 18 U.S.C. § 666 violation—"[t]he single rationally conceivable issue in dispute" at their first trial. 397 U.S. at 445. Under *Ashe*, that is all that is required to activate Double Jeopardy protection.

3. The First Circuit's rule would be a dramatic departure from age-old rules for *civil* adjudication. As the Court observed a century ago, "the 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice [*i.e.*, preclusion] in order, when a man once has been acquitted on the merits, to enable the government to prosecute him a second time." *United States* v. *Oppenheimer*, 242 U.S. 85, 88 (1916). "It cannot be," Justice Holmes explained, "that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." *Id. at* 87 True to that insight, this

Court in *Ashe* declined to condition preclusion on proof of what the jury *actually* decided. See p. 7, *supra*; compare Fed. R. Civ. P 49 (providing for special verdicts and general verdicts "with questions" in civil cases). And the general rule that civil judgments not subject to appeal are denied preclusive effect, see 18A Charles Alan Wright et al., Federal Practice & Procedure § 4433 (2d ed. 2016), does not allow prosecutors, who are barred from appealing acquittals, to "relitigat[e] issues that [have been] lost against the same defendant," *id.*[1]

Standard preclusion rules foreclose relitigation of matters, both factual and legal, necessarily and conclusively determined. See Restatement (Second) of Judgments § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."). And preclusive effect attaches when an issue is first conclusively resolved, notwithstanding continued litigation in the same controversy. Restatement (Second) of Judgments § 13 ("A judgment may be final

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[1] There are, to be sure, important rules of civil preclusion law that are already unavailable to criminal defendants, including the protection against claim splitting, see *United States* v. *Dixon*, 509 U.S. 688, 709 n.14 (1993), and the shield of defensive, nonmutual issue preclusion, see *United States* v. *Mendoza*, 464 U.S. 154, 158 (1984); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235 (1972). In domains where it does apply, however—and governs as a matter of constitutional law—preclusion, rooted in the respect for the criminal jury, is more, not less, potent. See David L. Shapiro, Civil Procedure: Preclusion in Civil Actions 47 (2001).

in a res judicata sense as to a part of an action although the litigation continues as to the rest."); 18A Charles Alan Wright et al., Federal Practice & Procedure § 4432 (2d ed. 2016) (collecting sources).

Importantly, while the existence of inconsistent—final—judgments may defeat preclusion in civil cases, Restatement (Second) Judgments § 29(4), none of the elements for preclusion inquires into the rationality of the first decision. Preclusion "does not depend on the correctness of the judgment." 18A Federal Practice & Procedure § 4433.

4. The same respect for the absolute finality of a jury's verdict that prohibits government appeals even when an acquittal is "based upon an egregiously erroneous foundation," or rendered "in the teeth of both law and facts," *Horning* v. *District of Columbia*, 254 U.S. 135, 138 (1920), necessarily applies to re-litigation and preclusion.[2] It would stand the Double Jeopardy right on its head to hold that the government, barred from appealing an irrational verdict of acquittal, could effectively overturn the jury's decision by initiating a fresh prosecution. "To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendants so that 'even though innocent he may be found guilty.'" *Scott*, 437 U.S. at 91 (quoting *Green*, 355 U.S. at 188).

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[2] Cf. *United States* v. *Gaudin*, 515 U.S. 506, 520 (1995) (overturning *Horning*'s conclusion that a court's error in directing a guilty verdict may be excused as harmless).

5. Although the First Circuit suggested that its rule followed from *Ashe*, the court did not deny that under *Ashe* the jury's acquittals—the only valid and final judgments in petitioners' case—would bar retrial "standing alone." Rather, the court below held that petitioners' claim was governed by an "important exception" to the *Ashe* principle codified in *United States* v. *Powell*, 469 U.S. 57 (1984), citing language from this Court's opinion that it read as supporting a juror rationality prerequisite.

But the holding and logic of *Powell* do not support—and indeed powerfully contradict—the First Circuit rule. In *Powell*, a jury had acquitted the defendant of substantive drug offenses, but convicted her of using a telephone in "committing and in causing" the same offenses. 469 U.S. at 60. Rejecting the defendant's argument that the inconsistency required that the guilty verdict be vacated, this Court instead upheld both. *Id.* at 69. That holding expressed undiminished respect for final and otherwise valid verdicts, rather than (as the First Circuit posited) a "limitation on the application of [preclusion principles]" whenever inconsistency is present. Pet. App. 10a.

In fact, as this Court later explained, the result reached in *Powell* "and, before that, in *Dunn* [v. *United States*, 284 U.S. 390 (1932)]"—"giving each [inconsistent] verdict *full effect*," *Yeager*, 557 U.S. at 124 (emphasis added)—affirms the finality of jury decisions, whether rational or not. Manifest logical inconsistency, those decisions held, *was not* ground for "impugn[ing] the legitimacy of either verdict." *Yeager*, 557 U.S. at 125. The *Powell* Court's refusal to view an inconsistent acquittal as basis for

overturning, on Double Jeopardy Clause grounds, an otherwise final, valid, and lawfully rendered judgment of conviction is no authority for relying on a *vacated* guilty verdict to "impugn" a valid, final acquittal and permitting a second prosecution to overturn the first jury's determination.

Brushing past this anomaly, the First Circuit placed heavy reliance on language in *Powell* observing that "principles of collateral estoppel * * * are predicated on the assumption that the jury acted rationally" and "impossible to apply" when inconsistent judgments are presented. Pet. App. 11a (quoting *Powell*, 469 U.S. at 68). But the defendant in *Powell* lost because of *adherence to* the presumption of rationality for each lawful verdict, inconsistency notwithstanding, and because those judgments' effects could, in essence, cancel one another out. By rebuffing a defendant's right to use inconsistency offensively, *Powell* did not hand the government a sword that could cut through Double Jeopardy protections and seek conviction of a defendant on charges of which he was already lawfully acquitted.

6. The aggressive reading of the *Powell* dictum adopted below was urged—and rejected—in *Yeager*, which overturned a decision that had allowed retrial on charges that would be precluded by acquittals "viewed in isolation," on the ground that viewing those verdicts "alongside [inconsistent] hung counts," "made it impossible, to decide with any certainty what the jury necessarily determined." 557 U.S. at 121 (quoting lower court opinion). *Powell*, the *Yeager* Court made clear, does not license "second-guess[ing] the soundness" of an acquittal, *id.* at 125: "a logical

inconsistency between a guilty verdict and a verdict of acquittal does not impugn the validity of either verdict." *Ibid.* Indeed, the Court continued, the Government's attack on the acquittals "violate[d] the very assumption of rationality it invoke[d] for support." *Ibid.* So too here.

Thus, in *Yeager*, where the need to give dueling final verdicts "full effect" was absent, the Court respected the preclusive effect of a jury's acquittal—notwithstanding the manifest illogic of the jury's behavior, *i.e.*, that a rational jury would necessarily have also acquitted on the hung counts had it made the determination ascribed to it under the *Ashe* rule. In so holding, *Yeager* reaffirmed the principle that "the jury's verdict 'brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality.'" 557 U.S. at 124 (quoting *Powell*, 469 U.S. at 67). Given that *Powell* and *Dunn* had held these virtues too important to yield in the presence of "a clearly inconsistent *verdict*," *Yeager* reasoned, it followed "*a fortiori*," that a "potentially inconsistent hung count [can] not command a different result." *Id.* at 125. So too with an inconsistent vacated verdict.

a. The First Circuit (and the Government opposing this Court's review) posited that a Double Jeopardy line could be drawn between hung verdicts and convictions vacated as unlawful, on the ground that the "fact of the conviction" remains "part of the record" and the jury here "sp[oke]" in rendering the—unlawful—guilty verdicts here in a way the *Yeager* jury did not. See Pet. App. 16a (noting Court's observation that "a jury speaks only through its verdicts") (quoting 557 U.S. at 121). But the hung

counts in *Yeager* were also a "fact," and they—including the evidence and argument presented to the jury and the case instructions, were fully part of the case record. And no further "speaking" was necessary to discern the irrationality of what the jury had done in that case. The Government's argument failed and the convictions on the re-tried charges were reversed because this manifest inconsistency, which could reflect compromise, "fatigue," or "confusion" within a jury asked to adjudicate 126 counts, 557 U.S. at 121, did not establish anything that qualified the legal significance of the valid acquittals.

b. *Yeager* and this case are indistinguishable on the point this Court's decision *did* treat as constitutionally significant. Vacated convictions are "nullities" and legal "nonevents" in the very same ways that hung counts are. When a criminal judgment "is reversed for error, then it is the same as if it had never been." 4 W. Blackstone, Commentaries on the Laws of England 336-337 (1769); accord *Bullington* v. *Missouri*, 451 U.S. 430, 442 (1981). Vacated convictions themselves are given no preclusive effect and thus should not deprive a valid, final acquittal of *its* preclusive effect.[3] 18A Federal

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[3] In the civil context, judgments vacated pursuant to parties' negotiated settlement were sometimes given preclusive effect, on the ground that parties' private interests should not automatically determine the effect of courts' valid and final public acts. See, *e.g.*, *Bates* v. *Union Oil Co. of Calif.*, 944 F.2d 647, 650 (9th Cir. 1991). The practice of routine vacatur by settlement was itself disapproved, however, in *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S 18, 26 (1994). If anything, the rationale and narrow character of this exception emphasizes the fundamental nature of the general rule that a vacated judgment has no preclusive effect.

Practice & Procedure § 4432 ("There is no preclusion as to the matters vacated or reversed."); *id.* ("Once a new trial is granted or the judgment is vacated, preclusion is of course defeated as to any matter that is left open for further proceedings.").[4] When a conviction is "vacated, all [underlying] factual determinations [are] vacated with it, and their preclusive effected surrendered." *Dodrill* v. *Ludt*, 764 F.2d 442, 445 (6th Cir. 1985). The vacatur "technically leav[es] nothing to which [a court] may accord preclusive effect." *Id.* at 444.

In other words, a vacated judgment is, as a matter of law, not conclusive. 1B James W Moore et al., Moore's Federal Practice ¶ 0.416[2] (2d ed. 1996) ("A judgment that has been vacated, reversed, or set aside on appeal is thereby *deprived of all conclusive effect*,

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[4] See also, *e.g.*, Restatement (Second) of Judgments § 13 (1982) ("The rules of res judicata are applicable only when a final judgment is rendered."); *No East-West Highway Comm., Inc.* v. *Chandler*, 767 F.2d 21, 24 (1st Cir. 1985) ("A vacated judgment has no preclusive force either as a matter of collateral or direct estoppel or as a matter of the law of the case."); *Stone* v. *Williams*, 970 F.2d 1043, 1054 (2d Cir. 1992) ("A judgment vacated or set aside has no preclusive effect."); *United States* v. *Nat'l Bank of Commerce*, 775 F.2d 1050, 1050 (8th Cir. 1985) ("[A]n order [to vacate] removes both the *res judicata* and the *stare decisis* effect of the vacated judgment."); *Ornellas* v. *Oakley*, 618 F.2d 1351, 1356 (9th Cir. 1980) ("A reversed or dismissed judgment cannot serve as the basis for a disposition on the ground of res judicata or collateral estoppel."); *Martinez* v. *Winner*, 800 F.2d 230, 231 (10th Cir. 1986) (an order to vacate "will remove[] 'both the *res judicata* and the *stare decisis* effect of the vacated judgment[s]'") (quoting *Bank of Commerce*, 775 F.2d at 1050); *United Bhd. of Carpenters & Joiners* v. *Operative Plasterers' & Cement Masons' Int'l Ass'n*, 721 F.3d 678, 691 (D.C. Cir. 2013) ("A judgment vacated either by the trial court or on appeal has no estoppel effect in a subsequent proceeding.").

both as res judicata and as collateral estoppel."). Nothing is determined by a conviction that is later vacated. A vacated conviction, therefore, cannot qualify a final acquittal.

For this reason, neither hung counts nor vacated convictions have immigration consequences, *Garces* v *U.S. Atty. Gen.*, 611 F.3d 1337, 1344 (11th Cir. 2010),[5] and neither can be introduced to impeach a witness at trial, *United States* v *Russell*, 221 F.3d 615, 622 (4th Cir. 2000).[6]

And of course, hung juries are treated identically *for purposes of the Double Jeopardy Clause*. This Court's decisions in *Arizona* v. *Washington* and *Justices of Boston Mun. Court* v. *Lydon*, 466 U.S. 294 (1984), rejected Double Jeopardy challenges to re-trials after mistrials and appellate vacaturs, respectively, for essentially the same reasons: The first prosecutions were "nonevents" for Fifth Amendment purposes. The logic of *Yeager* controls here: If these developments do not impair the Government's powers under the Fifth Amendment, so too must they leave defendants' rights unaffected. See 557 U.S. at 123-124. It is a very odd kind of legal

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[5] As in the civil settlement context just discussed, see n. 3, *supra*, if a conviction is vacated not on account of substantive or procedural error, but instead to forestall adverse immigration consequences, courts adjudicating immigration proceedings are not bound to disregard it. See *Andrade-Zamora* v. *Lynch*, 814 F.3d 945 (8th Cir. 2016). This exception is unique to the immigration context.

[6] Likewise, a court can exclude evidence of a previous mistrial. *United States* v. *Amato*, 540 F.3d 153, 165 (2d. Cir. 2008).

"nonevent" that strips a person of a "vital [constitutional] safeguard." *Green*, 355 U.S. at 198.

c. This case and *Yeager* are not constitutionally distinguishable: Both involved efforts to deny defendants Double Jeopardy protection—and deprive final, valid acquittals of their preclusive effect—on the ground the acquittals looked different viewed "alongside" legal nonevents that pointed to internal inconsistency on the jury's part. But to the extent there is a difference between hung counts and unlawfully obtained convictions, it surely does not support the First Circuit's rule. There is no reason why the Government should fare *better* and the defendant worse, when prosecutors obtained an inconsistent, unconstitutional guilty verdict than when the inconsistency arises from the Government's inability, after staying within lawful bounds, to obtain twelve votes to convict.

II. Respecting The Preclusive Effect of a Final Acquittal Furthers the Core Principles Animating the Double Jeopardy Clause

1. The First Circuit's rule slights the reasons why unique rules of finality govern jury acquittals. Like all preclusion regimes, the Double Jeopardy Clause advances society's interest in bringing litigation to an end, see, *e.g.*, *Hopkins* v. *Lee*, 19 U.S. (6 Wheat.) 109, 114 (1821), and the Fifth Amendment provides those criminally accused special protection against harassment and the possibility that prosecuters might win a war of attrition and obtain conviction of an innocent person. See *Green*, 355 U.S. at 187. But the rule—and the complementary prohibition against inquiry into juror deliberations, see, *e.g.*, *McDonald* v. *Pless*, 238 U.S. 264 (1915)—fundamentally express

respect for the importance of the jury's constitutional status and role. The right to trial by jury was guaranteed even before the Bill of Rights was ratified, see U.S. Const. art. III, § 2, cl. 3, and it reflects "a profound judgment about the way in which law should be enforced and justice administered." *Duncan* v. *Louisiana.*, 391 U.S. 145, 155-156 (1968). As the Court has explained:

> Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Id. at 155-156. See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 65 (2003) ("Before an individual can lose her liberty in a criminal case, the people themselves must agree."). Indeed, because of the jury's role as an instrument for citizen participation and its status within the judicial branch, see U.S. Const. art. III, the

question remained open until 1930 whether a defendant could *decline* a jury trial in federal court. See *Patton* v. *United States*, 281 U.S. 276 (1930).

Under the Constitution, jury trials, are meant to be the "main event," *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977), not "dry run[s]" for subsequent prosecutions. *Ashe*, 397 U.S. at 447 These commitments explain the sharply different treatment of convictions and verdicts of acquittal: "[O]verzealous prosecutors" and "compliant judges" will be slow to accept community decisions checking their exercises of power. And those same principles also account for rules protecting the sanctity of jury deliberations and the jury's "entitle[ment] to deliver a general verdict pronouncing the defendant's guilt or innocence." *Gaudin*, 515 U.S. at 513. Requiring juries to detail their reasons and providing a window into the dynamics of the jury room invite prosecutors and judges to review—and overturn—the jury's decisions. See *McDonald* v. *Pless*, 238 U.S. at 267 ("Jurors would be * * * beset by the defeated party" in every case, acting on "the hope of discovering something which might invalidate the[ir] finding.").

The First Circuit rule is irreconcilable with these principles. First, there can be no Double Jeopardy exception for verdicts rendered by juries whose actions appear irrational. A premise of the Constitution's "judgment" as to how "law should be enforced and justice administered," *Duncan*, 391 U.S. at 155, is that juries have the power to render final judgments of acquittal that are irrational—or at least appear so to prosecutors and courts. See *Jones*, 526 U.S. at 245. Indeed, possible internal logical inconsistency seems like a modest vice compared to

grounds that have been recognized to *not* support reexamination. See, *e.g.*, *Fong Foo*, 369 U.S. at 143 ("egregiously erroneous" acquittal must be respected). The decision below, however, empowers courts to second-guess otherwise preclusive, final verdicts by seeking ambiguities and provides prosecutors a means of circumventing the finality of those acquittals (likely all) they believe mistaken. By doing that, the First Circuit's rule denigrates the efforts of the jurors whose lawful unanimous verdict is cast aside—and who, like the defendant, have no means of defending their decision against allegations of irrationality.

2. The rule also implicates the second "vitally important interest[]" embodied in the Double Jeopardy Clause. *Yeager*, 557 U.S. at 117 Giving an acquittal its full preclusive effect protects individuals from the harm of enduring multiple trials. As this Court has explained, "whatever else [the Double Jeopardy] guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time." *Ashe*, 397 U.S. at 445-446 (quoting *Green*, 355 U.S. at 190). This interest reflects concern that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal." *Green*, 355 U.S. at 187.

To be sure, that concern, as *Yeager* recognized, has been held in some circumstances to be overcome by the interest in according the government a "fair opportunity to present [its] evidence to an impartial jury," *Washington*, 434 U.S. at 497. Thus, Double Jeopardy does not automatically bar the government

from bringing a second prosecution following a mistrial, *id.*, or following a stand-alone vacated conviction, *Lydon*, 466 U.S. at 308.

But, as *Yeager* makes clear, that governmental interest does not always prevail. As in that case, the jury here has already decided factual questions in petitioners' favor by returning a verdict of acquittal. See 557 U.S. at 123-124 (rejecting dissent's argument that government has an unqualified right to re-trials under these circumstances). The rule announced below would subject defendants to repetitive trials centering on the same issues previously decided. What the First Circuit granted the government was not "one" opportunity to present its evidence—but rather a do-over, which "subject[s the defendant] to embarrassment, expense and ordeal," *Green* 355 U.S. at 187, in the hope of a different outcome.

In any event, the First Circuit's rule is not limited to re-trials on the vacated charges. The same logic would also permit prosecution on *new charges* that conflict with a previous acquittal. Here, the central issue in dispute at petitioners' first trial was whether Martínez's generosity was an unlawful "bribe," a showing necessary for conviction under both 18 U.S.C. § 666 and the Travel Act. But if the "issue in dispute," *Ashe*, 397 U.S. at 445, had instead been travel in interstate commerce, and petitioners had been acquitted under 18 U.S.C. § 1952(a)(3)(A), but convicted—unconstitutionally—of another offense for which interstate travel was an element, the inconsistency between those valid and vacated verdicts would "strip[] the acquittals" of preclusive affect. Pet. App. 15a. Consequently, the government would be free to prosecute for any offense that

requires proof of travel, not merely the one vacated on appeal.[7]

III. Practical Realities of the Criminal Justice System Make Adherence to The *Ashe* Rule Critically Important

A. Prosecutors Should Be Required To Accept the Consequences of Their Decision to Pursue Multiple, Related Charges

The First Circuit's "narrow [and] grudging" conception of Double Jeopardy, *Green*, 355 U.S. at 198, is particularly fateful, given the present-day realities of our criminal justice system. As *Ashe* recognized nearly a half century ago, rules of preclusion, which protect against prosecutions on charges that are substantially identical to those previously tried but "distinct" under the *Blockburger* test, have become far more practically important. Whereas "[a] single course of criminal conduct was likely to yield but a single offense" at the time of the Framing, the Court observed, the "extraordinary proliferation of overlapping and related statutory offenses" in the twentieth century enabled

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[7] The decision below denied that it was robbing the acquittals of *all* preclusive effect, pointing out that they would "forever bar" the government from retrying petitioners on Travel Act charges. See Pet. App. 19a n.6. But that prohibition flows directly from the "same offence" language of the Double Jeopardy Clause. In any event, it is extraordinary in the law of preclusion to treat valid, final judgments as "restricted railway ticket[s] good for [one] day and train only." *Smith* v. *Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting); see also *Nichols* v. *United States*, 511 U.S. 738, 744 (1994) (refusing to "create[] a 'hybrid' conviction, good for the punishment actually imposed but not available for sentence enhancement in a later prosecution").

prosecutors to "spin out a startlingly numerous series of [distinct charges] from a single alleged criminal transaction." 397 U.S. at 445 n.10.

That reality has of course become even more "startling" in the decades after *Ashe*, prompting a former Attorney General to observe that "the sheer number of federal laws that impose criminal penalties has grown to an unmanageable point." Michael B. Mukasey & Paul Larkin, *Heritage Foundation Legal Memorandum: The Perils of Overcriminalization* at 1 (Feb. 12, 2015). The number of criminal offenses in the U.S. Code increased from 3,000 in the early 1980s to 4,000 by 2000, and more than 4,450 by 2008. See Heritage Found., "Overcriminalization," in *Solutions 2016* (2016) at 123. Indeed, this explosion of criminal laws has reached the point where it is no longer possible to render a precise count of the laws imposing criminal penalties, see *Defining The Problem and Scope of Over-Criminalization and Over-Federalization*, Hearing Before the H. Comm. on the Judiciary, 100th Cong. 32 (2013) (statement of John G. Malcom), though one credible estimate places the number of federal criminal statutes at 5,000, supplemented by more than 300,000 federal regulations whose violation can give rise to criminal punishment. See *Solutions 2016* at 126.

In almost every criminal case, the prosecutor can pick and choose among a wide array of statutes potentially applicable to the conduct alleged. By 2000, "[t]he federal criminal code contain[ed] over three hundred separate fraud and misrepresentation offenses," William J. Stuntz, *Self-Defeating Crimes*, 86 Va. L. Rev. 1871, 1881 (2000), such that the same conduct could be prosecuted as a violation of the

generic federal mail and wire fraud statutes, see, *e.g.*, 18 U.S.C. §§ 1341, 1343, and also as "bank fraud, health care fraud, tax fraud, computer fraud, bankruptcy fraud, accounting fraud, [or] conspiracy to defraud the government," Stuart P. Green, *Lying, Cheating, And Stealing: A Moral Theory of White Collar Crime* 152 (2006).

And the problem is not merely that prosecutors have a "smorgasbord" of offenses from which to choose, Pet. Br. at 45 (quoting Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. Crim. L. & Criminology 643, 653 (2006)), but that they are largely free to opt for "all of the above" from the buffet. The first casualty of this extraordinary shift in power is that the Constitution's principal safeguards for checking prosecutorial overreach, the Sixth Amendment jury trial right and the Double Jeopardy Clause's rule of absolute finality are, in the vast majority of cases, never engaged. As the Court has recognized, "[c]riminal justice today is for the most part a system of pleas, not a system of trials." *Laffler* v. *Cooper*, 132 S. Ct. 1376, 1381 (2012). Of the 75,573 criminal cases disposed of in federal district courts in 2003, 95% were resolved by a guilty plea. Lindsay Devers, U.S. Dep't of Justice, *Plea and Charge Bargaining* 1 (2011). Thus, plea-bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system," and "horse trading" between prosecutors and defense counsel largely "determines who goes to jail and for how long." *Missouri* v. *Frye*, 132 S. Ct. 1399, 1407 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1919 (1992) (emphasis in original)). Although this Court has long expressed concern about wrongful

convictions resulting from innocent defendants' being worn down through multiple prosecutions by heavily resourced prosecutors, 355 U.S. at 187-188, prosecutors' power to stack charges exerts tremendous pressure on the accused to accept a plea offer rather than maintain innocence at trial and risk maximal punishments. See Kyle Graham, *Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 Cal. L. Rev. 1573, 1582 (2012); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 520 (2001).

Indeed, one need not strain to see these dynamics at work in this case or *Yeager*: The defendant in *Yeager* was charged, in a "fifth superseding indictment," with some 126 violations of five federal overlapping offenses. In such cases, "confusion" and "exhaustion" among lay jurors are utterly unsurprising. 557 U.S. at 121. Here, the government charged Bravo and Martínez with multiple federal felonies based on their trip to watch a sporting event and its alleged link to a noncontroversial, nearly unanimous legislative vote. It was only after trial that the district court realized that the Puerto Rico statutes supplying the predicate for convicting Bravo on one count had been repealed, Pet. App. 110a-111a, and even in the Court of Appeals there remained confusion as to what Bravo's conviction for "unspecified 'racketeering activity'" referred to, *id.* 4a.

Although the Double Jeopardy Clause cannot be expected to significantly curb such pretrial overreaching, the First Circuit's rule, by reducing the practical value of a verdict of acquittal, needlessly aggravates this already troubling dynamic.

Defendants who refuse plea offers, brave the vagaries of criminal trials, and obtain jury verdicts of acquittal—in this case the only valid judgments that were entered at trial—still risk further prosecution based on claimed inconsistency with vacated, wrongful counts. Standing on its own, this rule is palpably unfair: The government, which already has substantial incentive to take a "kitchen sink" approach—*Powell* allows prosecutors to retain inconsistent (valid) convictions—may take aim at the acquittals, by pursuing multiple, overlapping charges and invoking inconsistency born of confusion and exhaustion to attack the jury's verdicts as irrational. And considered in light of *Yeager*, the rule is truly perverse: The Prosecution is better off pushing for an unconstitutional conviction.

As in *Yeager*, it was the prosecution in this case, not the defense, that decided to charge repetitive and predicate offenses; that elected to present each charge to the jury separately; and that insisted on jury instructions that authorized conviction for conduct that Congress did not make criminal. It is the prosecution, therefore, that should in fairness bear the consequence of the acquittal and the inconsistent unlawful verdict on the overlapping charges.

B. The First Circuit Rule Creates Serious Problems of Fairness and Administrability

In allowing the government to pursue a second § 666 prosecution, the First Circuit simply assumed that petitioners' second trial would proceed as if the first one (including the acquittal) had never occurred. However accurately that assumption reflects practice in the *federal* courts, it seriously misdescribes practice in many *state* courts and will cause serious

problems of administrability there. See *Benton* v. *Maryland*, 395 U.S. 784 (1969) (federal Double Jeopardy Clause applies in state prosecutions).

Following this Court's decision in *Dowling* v. *United States*, 493 U.S. 342 (1990), most States allow the government to introduce evidence in subsequent prosecutions tending to show that the defendant was guilty of a crime of which he was earlier acquitted. See *State* v. *J.M., Jr.*, 438 N.J. Super. 215, 230 n.11 (N.J. Super. Ct. App. Div. 2014) (collecting cases), *appeal granted* 221 N.J. 216 (2015). But the majority of States have also permitted *the defense* to introduce evidence of the prior acquittal. *Id.* at 234 n.15 (collecting cases).[8] These rules have generated difficult practical problems, which the First Circuit's rule aggravates. Some States permit judges to "take judicial notice" of an earlier acquittal. See, *e.g.*, *Hess* v. *State*, 20 P.3d 1121, 1123 (Alaska 2001). Other States allow the defendant to enter into evidence the physical judgment of acquittal from his previous trial. See *Nolan* v. *State*, 131 A.2d 851, 857 (Md. 1957). And others have taken a third course, allowing admission of "[a]ll of the facts of the previous trial and acquittal" at the later trial. See, *e.g.*, *Hare* v. *State*, 467 N.E.2d 7, 18 (Ind. 1984); *State* v. *Bernier*, 491 A.2d 1000, 1005-1006 (R.I. 1985) (potentially allowing acquittal to be admitted through "the parties' testimony").

While all of these approaches are fairer than the prevailing federal practice, which treats the fact of

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[8] Federal circuits, by contrast, have generally excluded such evidence altogether. See, *e.g.*, *United States* v. *Dortch*, 696 F.3d 1104, 1114 (11th Cir. 2012); *United States* v. *Jones*, 808 F.2d 561, 566–567 (7th Cir. 1986).

acquittal as inadmissible—and effectively requires a duly-acquitted person to defend himself a second time, see *Dowling*, 493 U.S. at 362 (Brennan, J., dissenting)—each has proven problematic. Defendants in the first two groups of States receive only bare protection, and jurors can be baffled as to what to make of a prior acquittal (and the prosecution's decision to bring a new case). The third approach, in contrast, can result in a trial-within-a-trial, with the defendants explaining the first jury's acquittal to the new jury and arguing what that judgment means. The *Hare* court held just such a trial, concluding that a key prosecution witness "did * * * a poor job of testifying before the [original] jury" and that this was the "likely * * * reason the [first] jury found the defendant not guilty there." 467 N.E.2d at 18.

Besides burdening the courts, such retrials-within-trials ask jurors to enter the minds of jurors in a different case to determine on the basis of indirect evidence *why* that group acquitted and effectively require defendants to "rebut all inferences about what *may have* motivated the [original] jury" to reach the conclusion it did, *Yeager*, 557 U.S. at 122 n.6 (emphasis in original), a burden they cannot meet with direct evidence of the first jurors' intent. And such proceedings sow confusion about jurors' own service. A second jury tasked with determining whether an earlier acquittal was correct will be understandably uncertain about the practical and legal significance of *its* verdict.

Indeed, the First Circuit's rule would require state juries to determine the meaning and legal effect of acquittals in the most problematic situation possible.

Cases like this one do not involve allegations that the defendant committed a *similar* crime at a different time. See, *e.g.*, *Walker* v. *State*, 921 P.2d 923, 925 (Nev. 1996) (series of similar robberies). The First Circuit rule, by definition, concerns factual issues identical to some of those in a prior prosecution. In these circumstances, juries will have the greatest difficulty knowing what to make of a prior acquittal.

By ensuring that cases involving apparently inconsistent final and vacated verdicts are resolved at the *Ashe* stage, petitioners' rule would avoid all these problems. If the record of the proceedings that resulted in the acquittal "necessarily" establishes determinations that would render conviction at retrial impossible, the judge would not let a second prosecution proceed. A second prosecution *may* proceed, by contrast, if the judge determines that a conviction would not contravene a determination a rational jury necessarily would have made in acquitting the defendant. Such an approach avoids plunging later judges, let alone jurors, into determining what *may* have led the first jury to acquit (and doing so without the benefit of first-hand testimony from the jurors themselves). By enforcing a rule that gives final acquittals—and vacated convictions—their usual effect, this Court would prevent an already messy situation in state courts from becoming worse.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted.

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Supreme Court of the United States

JUAN BRAVO-FERNANDEZ AND
HECTOR MARTÍNEZ-MALDONADO,
Petitioners,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. RELYING ON A VACATED CONVICTION TO DEPRIVE AN ACQUITTAL OF ITS COLLATERAL ESTOPPEL EFFECT IS INCONSISTENT WITH *YEAGER* AND FUNDAMENTALLY UNFAIR	3
II. THE FIRST CIRCUIT'S DECISION MAKES COLLATERAL ESTOPPEL EFFECTIVELY UNAVAILABLE IN MULTI-COUNT PROSECUTIONS RESULTING IN A VACATED CONVICTION	11
III. THE FIRST CIRCUIT'S DECISION ENCOURAGES OVERCHARGING AND SUCCESSIVE PROSECUTIONS	12
CONCLUSION	15

TABLE OF AUTHORITIES

CASES Page

Ashe v. *Swenson*, 397 U.S. 436 (1970) 3, 4, 9, 14
McDonald v. *Pless*, 238 U.S. 264 (1915) 12
People v. *Wilson*, 852 N.W.2d 134 (Mich. 2014) 7
Poland v. *Arizona*, 476 U.S. 147 (1986) 7
Schiro v. *Farley*, 510 U.S. 222 (1994) 3
Tibbs v. *Florida*, 457 U.S. 31 (1980) 13
United States v. *DiFrancesco*, 449 U.S. 117 (1980) 12, 14
United States v. *Powell*, 469 U.S. 57 (1984) 6
Warger v. *Shauers*, 135 S.Ct. 521 (2014) 12
Yates v. *United States*, 135 S.Ct. 1074 (2015) (Kagan, J. dissenting) 14
Yeager v. *United States*, 557 U.S. 110 (2009) ..... *passim*

CONSTITUTION

U.S. Const. amend. V 3

RULE

Fed. R. Evid. 606(b) 12

OTHER AUTHORITIES

Nicole L. Waters et al., U.S. Dep't of Justice, Bureau of Justice Statistics, *Criminal Appeals in State Courts* (2015), http://www.bjs.Gov/content/pub/pdf/casc.pdf 10

TABLE OF AUTHORITIES—continued

Page

U.S. Dep't of Justice, Executive Office for United States Attorneys, *United States Attorneys' Annual Statistical Report Fiscal Year 2013*(2013), https://www.justice.gov/sites/default/files/usao/legacy/2014/09/22/13statrpt.pdf 10

INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit, voluntary bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of a crime or misconduct.

NACDL was founded in 1958 and has approximately 9,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL filed an *amicus* brief in support of the petitioners in *Yeager* v. *United States*, 557 U.S. 110 (2009), and files here because it has grave concerns that the First Circuit's rationale in this case undermines the protections afforded defendants by the Double Jeopardy Clause, particularly in light of the proliferation of vague and expansive criminal statutes and the accompanying rise of indictments bloated with duplicitous and overlapping charges.

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[1] In accordance with Supreme Court Rule 37, *amicus curiae* states that no counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. Petitioners and Respondent have consented to the filing of this brief. Letters reflecting such consent have been filed with Clerk.

SUMMARY OF THE ARGUMENT

When a jury acquits on one count of a multi-count prosecution but hangs on another count relying on the same facts, the collateral estoppel prong of the Fifth Amendment's guarantee against double jeopardy prevents a retrial on the hung counts. But when a jury acquits on one count and convicts on another with the same facts, each verdict stands and the defendant may not overturn the conviction, even though it may be utterly irreconcilable with the acquittal as a matter of fact, law, and logic. The question in this case is simple, but essential to the continued vitality of the Double Jeopardy Clause's collateral estoppel effect: Whether a vacated conviction based on an incorrect jury instruction should be treated like a valid conviction or like a hung count.

Treating a vacated conviction the same as a valid conviction for collateral estoppel purposes, as the First Circuit did in this case, unjustly revives a conviction that should never have been possible, and gives it continuing legal effect where it should have none. It produces a windfall for the prosecution, effectively nullifying the oftentimes-Herculean efforts of defense counsel to vacate an illegal conviction in the first place. It stacks the deck against collateral estoppel in multi-count cases, and directs courts into the kind of searching and hyper-technical analysis of jury proceedings that this Court has long cautioned against. And it emboldens the worst impulses of prosecutors in a world where a single act can be subject to penalty under a dizzying and constantly expanding array of criminal statutes.

ARGUMENT

I. RELYING ON A VACATED CONVICTION TO DEPRIVE AN ACQUITTAL OF ITS COLLATERAL ESTOPPEL EFFECT IS INCONSISTENT WITH *YEAGER* AND FUNDAMENTALLY UNFAIR.

The Double Jeopardy Clause of the Fifth Amendment provides that "No person shall be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V As part of that guarantee, the Clause includes a collateral estoppel prong. An "awkward phrase" that "stands for an extremely important principle in our adversary system of justice," collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970).

To apply the collateral estoppel bar, a court must engage in "an examination of the entire record," approaching the inquiry with "realism and rationality" rather than "the hypertechnical and archaic approach of a 19th century pleading book." *Id.* at 444. The court must thus "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter," to decide "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* (citing Mayers & Yarbrough, *Bis Vexari*: *New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 38–39). If the court concludes that the fact at issue was "actually and necessarily decided" in favor of the defendant in a previous acquittal, *Schiro* v. *Farley*, 510 U.S. 222, 236 (1994),

then the government may not seek to persuade any future jury to come down the other way on the same factual issue in any subsequent prosecution. The inquiry is a pragmatic one that "must be set in a practical frame" of mind; any "more technically restrictive alternative would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." *Ashe*, 397 U.S. at 444.

Thus, in *Ashe* itself, this Court confronted a case in which a defendant was alleged to have robbed six victims at a home poker game. *Id.* at 437–38. The jury acquitted the defendant on charges of robbing one of the victims, and this Court held that collateral estoppel barred the prosecution from trying again with another one of the victims. *Id.* at 445. In light of the particular facts and record of that case, this Court held that "[t]he single rationally conceivable issue before the jury [in the first trial] was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not." *Id.* The prosecution therefore could not argue to a subsequent jury that the defendant was in fact one of the robbers, contrary to the previous jury's conclusion.

The *Ashe* inquiry requires courts to undertake a thorough and pragmatic review of the record from the initial trial to determine what the jury necessarily decided. But there are limits on that inquiry. As this Court explained in *Yeager* v. *United States*, 557 U.S. 110 (2009), a court cannot rely on implications from a jury's failure to reach agreement on one count to assess what it must have decided in acquitting on another count. For purposes of the collateral estoppel inquiry, "[a] hung count is not a 'relevant' part of the 'record of [the] prior proceeding.'" *Id.* at 121–22.

That is so even though the acquittal may be logically irreconcilable with a failure to reach agreement on the other count. "A host of reasons—sharp disagreement, confusion about the issues, exhaustion after a long trial, to name but a few—could work alone or in tandem to cause a jury to hang." *Id.* For a court applying the *Ashe* inquiry to attempt "[t]o ascribe meaning to a hung count" would require "guesswork" and "speculation into what transpired in the jury room," factors which "should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return." *Id.* at 122.

That is not to say that the logical implications of a hung count shed no light at all on what a jury may have decided in acquitting on another count. The facts of *Yeager* illustrate the point. There, a jury acquitted the defendant on several fraud counts, and hung on several insider trading counts. *Id.* at 115. Both the fraud counts and the insider trading counts relied on the same allegation that the defendant possessed material non-public information about his company; if the jury believed that the defendant did not have such information, which it must have done to acquit on the fraud counts, then it logically should have acquitted on the insider trading counts as well. *Id.* To reach the outcome it did, the jury must have either misunderstood or failed to apply the court's instructions—perhaps due to "confusion about the issues [or] exhaustion after a long trial." *Id.* at 121. Given that confusion, it was not possible in *Yeager* to be certain that the jury had *necessarily* decided the factual issue in favor of the defendant on the acquitted counts.

But this Court held that such reasoning is simply, and categorically, irrelevant to the *Ashe* inquiry. "[A] jury speaks only through its verdict," so any insight

that can be gleaned from sifting the tea leaves of counts that did not produce a valid final jury verdict has no power to strip the jury's actual verdict of its collateral estoppel force. *Id.*

Inconsistent final verdicts in the same trial are a different matter, however. As this Court held in *United States* v. *Powell*, 469 U.S. 57 (1984), a defendant may not leverage an acquittal on one count to overturn a valid and final, though logically inconsistent, conviction on another. Such cases "present a situation where 'error,' in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored." *Id.* at 65. When two verdicts in the same trial are irreconcilable, it is impossible to know which one "the jury 'really meant.'" *Id.* at 68.

The First Circuit relied on *Powell* to conclude that "a true inconsistency in what the jury has done in acquitting on one offense while convicting on another can make unanswerable *Ashe*'s question about what the jury necessarily decided in rendering the acquittal." Pet. App. 11a. That reasoning was wrong when the Fifth Circuit applied it in *Yeager*, and it is wrong here.

Yeager distinguished *Powell* on two grounds, each of which is equally applicable to this case. First, this Court observed that it is inappropriate to "take[] *Powell*'s treatment of inconsistent *verdicts* and import[] it into an entirely different context involving both *verdicts* and seemingly inconsistent *hung counts*." 557 U.S. at 124. Hung counts are different from valid final verdicts, this Court reasoned, because "hung counts have never been accorded respect as a matter of law or history, and are not similar to jury verdicts in any relevant sense." *Id.*

Just so with vacated convictions. Once a conviction is vacated for trial error, "the slate [is] wiped clean." *Poland* v. *Arizona*, 476 U.S. 147, 152 (1986) (quoting *Bullington* v. *Missouri*, 451 U.S. 430, 442 (1981)). And not always to the defendant's ultimate benefit—unless collateral estoppel applies, a defendant who succeeds in vacating a conviction (except by persuading the reviewing court that the prosecution failed to prove its case) faces the full range of punishment available under the law in a subsequent prosecution. A vacated conviction provides no basis for recidivist sentencing enhancements, or felon-in-possession charges, or a change in immigration status; on the other hand, a defendant who succeeds in vacating a conviction with a lenient sentence risks a harsher sentence on the second go around unless the defendant can show vindictiveness. And all for the same reason: A conviction, once vacated, ceases to have any legal effect whatsoever—except, under the First Circuit's rule, to deprive a valid and final acquittal of its collateral estoppel effect. See, *e.g.*, *People* v. *Wilson*, 852 N.W.2d 134, 141 n.5 (Mich. 2014). Carving out one solitary patch of doctrine in which to give vacated convictions continued legal consequence makes no sense—any more than affording the same ramifications to hung counts did in *Yeager*.

Yeager's second basis for distinguishing *Powell* is equally apropos in the context of a vacated conviction. The government in *Yeager* argued that "a mistried count can, in context, be evidence of irrationality," thus stripping the acquittal of collateral estoppel effect under *Powell*. 557 U.S. at 124–25. But "the fact that a jury hangs is evidence of nothing." *Id.* at 125. At best, "there is merely a *suggestion* that the jury may have acted irrationally." *Id.*

That logic applies *a fortiori* to vacated convictions. When a jury receives valid instructions and produces logically inconsistent results, it is possible to make at least some inferences about the rationality of its deliberative process. But that is not the case when the jury is misdirected. Some or all of the jurors may have voted to convict on the bribery count in this case because they believed that the defendants engaged in conduct that all now agree is legal. The faulty instruction in this case adds another layer of confusion to any attempt to figure out what the jury may have believed, and makes any assessment of the jury's rationality still more speculative than in *Yeager*.

Beyond the clear doctrinal resonances between this case and *Yeager*, though, lies a more fundamental concern: Allowing a second prosecution in this case would be profoundly unfair. The erroneous jury instruction in this case dramatically and illegally lowered the bar for the prosecution, subjecting a huge range of innocent conduct to criminal sanction. And allowing the prosecution to try again now that the conviction has been vacated amounts to an unjustifiable windfall.

Had the jury been correctly instructed, there is every reason to believe that Petitioners would not have been convicted, particularly in light of the acquittals on the conspiracy and Travel Act counts. If even a single juror voted to convict for bribery based only the gratuity theory, and would have voted to acquit if properly instructed on quid pro quo bribery, then re-prosecution would be out of the question. The jury would either have hung, in which case *Yeager* would preclude another prosecution, or acquitted altogether.

The First Circuit's rule gives the prosecution another shot, even after it faced an artificially low burden on its first attempt. The prosecution may thus treat its first attempt as a test run, and "refine[] [its] presentation in light of the turn of events at the first trial"—in other words, "precisely what the constitutional guarantee forbids." *Ashe*, 397 U.S. at 447. With the benefit of a full-scale dress-rehearsal at the first trial, the prosecution can hone its presentation, better prepare its witnesses, and anticipate defense strategy. Conversely, petitioners will be forced to "run the gantlet" again, *id.* at 445-46, contrary to the "'deeply ingrained' principle that 'the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Yeager*, 557 U.S. at 117–18 (quoting *Green* v. *United States*, 355 U.S. 184, 187–88 (1957)).

The First Circuit's rule also turns this Court's historic concern for "the finality of judgments"—one of the "vitally important interests" protected by the Double Jeopardy Clause—on its head. *Id.* at 117, 118 (quoting *Crist* v. *Bretz*, 437 U.S. 28, 33 (1978)). The jury finally and conclusively found the Petitioners not guilty of the conspiracy and Travel Act counts. But under the First Circuit's approach, another jury will be asked to resolve the same underlying factual dispute. That approach flies directly in the face of this Court's longstanding special solicitude for the finality of acquittals: "the fact that petitioner has already survived one trial should be a factor cutting

in favor of, rather than against, applying a double jeopardy bar." *Id.* at 122.

On top of depriving Petitioners of the ordinary benefit of an acquittal, the First Circuit also effectively nullified their efforts to vacate the illegal conviction. The kind of victory Petitioners achieved on appeal in this case is rare and difficult to achieve—in 2010, for example, less than one in eight criminal appeals in state court resulted in *any* modification or reversal of a conviction, including remands for new trials. See, Nicole L. Waters et al., U.S. Dep't of Justice, Bureau of Justice Statistics, *Criminal Appeals in State Courts* 1 (2015), http://www.bjs.Gov/content/pub/pdf/casc.pdf. The odds are even more daunting for appellants raising challenges to jury instructions: only 8.5% of such challenges, or around one in twelve, succeeded in state courts in 2010. *Id.* at 6. The picture in federal court is grimmer still for criminal appellants, with only 423 of the 8,342 criminal appeals in fiscal year 2013, or just over 5%, resulting in any decision against the government. See U.S. Dep't of Justice, Executive Office for United States Attorneys, *United States Attorneys' Annual Statistical Report Fiscal Year 2013* 72 (2013), https://www.justice.gov/sites/default/files/usao/legacy/2014/09/22/13statrpt.pdf.

Having overcome the many obstacles to relief and secured the vacatur of their illegal convictions, Petitioners have since faced literally years of additional "embarrassment, expense and ordeal" to fight off the government's efforts to re-prosecute on factual claims that have already been rejected by one jury. This Court should not tolerate such a dramatic erosion of the Double Jeopardy Clause's collateral estoppel protections.

II. THE FIRST CIRCUIT'S DECISION MAKES COLLATERAL ESTOPPEL EFFECTIVELY UNAVAILABLE IN MULTI-COUNT PROSECUTIONS RESULTING IN A VACATED CONVICTION.

The First Circuit's logic in this case sets up the same trap for criminal appellants as the Fifth Circuit created in *Yeager*. By weighing the implications of a legal non-event, whether a vacated conviction or a hung count, each court effectively rendered collateral estoppel a dead letter in multi-count prosecutions. That is because the criminal defendant, as the party seeking to invoke collateral estoppel, bears the burden of showing that an issue of ultimate fact was actually and necessarily decided in her favor by the original jury. Considering the jury's decision in a vacated conviction alongside a factually overlapping acquittal *necessarily* introduces uncertainty as to what the jury may have been thinking. And that uncertainty alone is enough, given the defendant's burden, to make collateral estoppel effectively unavailable. A tie goes to the government, and when the same factual considerations underpin multiple counts, a defendant will practically never be able to show better than a tie.

Of course, as *Yeager* recognized, the possible explanations for seemingly inconsistent verdicts are many and varied; all the more so when the jury gets the wrong instruction on a crucial count. "[C]onfusion about the issues" and "exhaustion" will always remain as possible explanations, and so will the jury's possible good-faith belief that innocent conduct was actually criminal. The defendant will never be able to know, or show, for sure.

Even if she could rustle up proof of what the jury actually and necessarily decided, it would be of no

use. The federal rules generally forbid the introduction of evidence about what transpired in the jury room in any proceeding affecting the validity of the jury's verdict. See Fed. R. Evid. 606(b); see also, *e.g.*, *Warger* v. *Shauers*, 135 S.Ct. 521, 524 (2014). Courts have consistently been wary of allowing such evidence, fearing that it "would open the door to the most pernicious arts and tampering with jurors" and "lead to the grossest fraud and abuse," leaving "no verdict . . . safe." *McDonald* v. *Pless*, 238 U.S. 264, 268 (1915) (internal citations and quotation marks omitted). But with no way to discover what a jury actually decided, or to introduce such evidence even if it were available, a defendant is left powerless to balance the scales when a reviewing court weighs vacated convictions in the *Ashe* inquiry.

The decision below makes a mockery of the constitutional promise of collateral estoppel protection from double jeopardy when a conviction is vacated. This Court should reaffirm that acquittals are due "special weight" under the Double Jeopardy Clause, and that a legal non-event like a vacated conviction cannot strip a conclusive judgment of acquittal of its finality. *United States* v. *DiFrancesco*, 449 U.S. 117, 129 (1980).

III. THE FIRST CIRCUIT'S DECISION ENCOURAGES OVERCHARGING AND SUCCESSIVE PROSECUTIONS.

Allowing vacated convictions to strip otherwise final acquittals of their collateral estoppel effect inevitably makes it more appealing for prosecutors to bloat indictments with overlapping charges on factually related crimes stemming from the same conduct. And it encourages prosecutors to push the envelope with aggressive theories of liability, secure in the knowledge that any vacated conviction can be

recharged, whether or not the jury acquitted on a factually overlapping count. Larding indictments with overlapping charges acts as an insurance policy against both the collateral estoppel consequences of an acquittal on any one charge and the possibility that an appellate court will overturn an erroneous jury instruction. When a jury convicts on one count and acquits on another with the same underlying facts, the acquittal will pose no barrier to re-prosecuting in case the conviction is vacated. Piling on related charges costs the prosecutors nothing, and the First Circuit's approach sharply curtails the risks from pushing for aggressive readings of already broad criminal statutes.

This case illustrates the point. Bringing conspiracy and Travel Act charges as well as the underlying bribery charge gave the prosecutors three shots on goal for the same underlying conduct. If only the Travel Act count or only the conspiracy count had been tried, *Ashe* would prevent a subsequent trial on the bribery charge. And if the jury had been instructed that bribery requires quid pro quo corruption, rather than a mere gratuity, the prosecution would have had a tougher hill to climb to secure a conviction. But when the jury rejected the conspiracy and Travel Act counts, and the appellate court threw out the gratuity theory of bribery, the First Circuit's pinched interpretation of collateral estoppel allows the prosecution a *fourth* attempt to make the same factual charges stick.

Constricting collateral estoppel in this manner rewards "[r]epeated prosecutorial sallies [that] unfairly burden the defendant and create[s] a risk of conviction through sheer governmental perseverance." *Tibbs* v. *Florida*, 457 U.S. 31, 41 (1982). It allows prosecutors to hone their trial

strategies and evidence in successive efforts at conviction, and it keeps defendants trapped in a "continuing state of anxiety and insecurity." *DiFrancesco*, 448 U.S. at 128.

The First Circuit's erosion of the Double Jeopardy Clause's collateral estoppel element contributes to the "deeper patholog[ies]" of the criminal justice system, including excessively "broad and undifferentiated" criminal statutes, "too-high maximum penalties," and "prosecutors [with] too much leverage." *Yates* v. *United States*, 135 S.Ct. 1074, 1101 (2015) (Kagan, J., dissenting). It exacerbates the problems created by the "extraordinary proliferation of overlapping and related statutory offenses" that allow "prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction," and it adds to "the potential for unfair and abusive reprosecutions." *Ashe*, 397 U.S. at 445 n.10.

The decision below lets the most aggressive prosecutorial tactics off the leash, protecting prosecutions from the downsides of acquittals and leaving defendants vulnerable to multiple trials on the same factual issues. A robust collateral estoppel doctrine is essential to the real-world vitality of the Double Jeopardy Clause, and this Court should step in to defend that indispensible constitutional protection.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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